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For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

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THE INFLUENCE OF LAW AND ECONOMICS SCHOLARSHIP ON CONTRACT LAW: IMPRESSIONS TWENTY-FIVE YEARS LATER

*JEFFREY L. HARRISON**

INTRODUCTION

Twenty-five years ago I was honored to be invited to participate in a contract law conference sponsored by New York University in conjunction with the publication of the *N.Y.U. Annual Survey of American Law*.[1] My specific assignment was to assess the impact of law and economics scholarship on contract law. I responded by conducting an empirical study of judicial citations to selected law and economics works in order to ascertain the extent to which judges seemed to be relying on the teachings of law and economics. In

* Stephen C. O'Connell Chair and Professor of Law, University of Florida College of Law. Thanks to Ben Goodman and Sarah Harrison for their assistance.

1. *See* Jeffrey L. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law*, 1988 N.Y.U. ANN. SURV. AM. LAW 73 (1988).

effect, the effort was part of a general question that concerns all law professors: Does scholarship matter?

With the permission of the editors of the *N.Y.U. Annual Survey of American Law*, I have repeated the study with respect to the scholarship sample selected twenty-five years ago. In addition, I have supplemented and expanded the sample of scholarship to include works appearing since the initial effort. The results of that project are the focus of this article. This examination suggests that law and economics scholarship has had two uses. First, it has provided a new rationale for many traditional contract rules. As one would expect, this means it is most likely to be invoked when there are pressures to change the law. Second, although the quantity of citations remains modest, it is clear that law and economics scholarship, at least in the context of contract law, has affected the vocabulary and reasoning of courts.

Before discussing those results, I address a number of preliminary matters. First, it is useful to understand the methodology, its limitations both now and twenty-five years ago, and the results of that earlier study. Section II is devoted to these matters. Second, it is important to understand the different scholarly landscapes of the late 1980s and the present. In fact, since my initial offering, two important areas of study—behavioral economics[2] and happiness[3]—have come to influence the economic approach to law and possibly also contract law. The discussion is found in Section III. Finally, in Section IV, the empirical results are presented and discussed. Both quantitative and qualitative assessments are made.

I.
SEARCHING FOR THE IMPACT OF LAW AND ECONOMICS: THE INITIAL STUDY

In the 1988 version of this effort,[4] I selected fifty-eight books and articles that could fairly be described as involving economics and contract law.[5] The selection was not random. My sample was composed of articles that were well placed as far as the prestige of the journal and were ones I was generally familiar with as having important implications for the field. As examples, several articles

2. *See infra* pp. 9–13.

3. *See infra* pp. 13–16.

4. The actual research of the original study was undertaken in 1987.

5. It would not be accurate to say that all of those selected "applied" economics to law because some were critical of the economic approach. *See, e.g.*, Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the* Second Restatement, 81 COLUM. L. REV. 111 (1981).

coauthored by Charles Goetz and Robert Scott were included, as well as a series of articles by Richard Epstein.[6] Two books were included.[7] One was Richard Posner's *An Economic Analysis of Law*,[8] and the other was A. Mitchell Polinsky's *An Introduction to Law and Economics*.[9] If anything, one could argue that the selection of the articles and books was biased toward overstating the influence of law and economics since it was disproportionately composed of works by some of the leading authorities of the era.

Using the Westlaw database "allcases" I determined the frequency of citation for each work in the sample. Half of the works of the fifty-eight selected were not cited in any case found in the "allcases" database. In fact, there were only seventy-six citations to the selected works in total. Only sixty-four separate cases had cited the works, owing to the fact that some cases cited more than one work from the sample.

In each instance of a citation, the work was classified as either having no apparent impact on the decision, having its economic logic recognized although not apparently influencing the outcome, or having actually influenced the outcome. A citation was placed in the first category if the work was cited in a string-cite or for a proposition unrelated to law and economics. This does not mean the work did not support the opinion. To be in the second category, a citation had to involve an express recognition of the economic analysis of the issue. If the court seemed to adopt the economic analysis of the work as persuasive, it was included in the final category.[10] In nineteen of the sixty-four cases, I felt it was fair to say that econom-

6. These are all identified in Appendix A.

7. The analysis was confined to citations to the parts of the books that were devoted to contract law.

8. At the time of the original survey, Judge Posner's book was in its second edition. Currently it is in its seventh. Citations found here are to the seventh edition, which was published in 2007.

9. The Polinsky book was in its first edition at the time of the original study. It is now in its fourth edition.

10. As an example, consider the following from *DAR & Associates, Inc. v. Uniforce Services, Inc.*, 37 F. Supp. 2d 192, 201 (E.D.N.Y. 1999):

> Contracting parties have an incentive to negotiate a liquidated damages clause whenever the costs of such a negotiation are less than the expected costs resulting from their reliance on the standard compensatory damages rule for breach of contract. *See* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Col.L.Rev. 554, 559 (1977). This incentive was present here with respect to a prospective breach by DAR of the noncompete and nonsolicitation clauses.

The court then went on to apply the analysis to the facts in the case.

ics scholarship had influenced the outcome.[11] At the time, I expressed surprise that the works had been cited so infrequently.[12] The results of that previous study are found in Appendix A to this work.

The current effort returns to the fifty-eight works in the original sample. In Appendix A, citations to those works in cases decided since 1987 are marked with an asterisk. In addition, I added twenty-two newer works to the sample. The selection process for the additional twenty-two was similar to that for the original fifty-eight. I selected well-placed articles that seemed to me to have important implications for contract law. These are found in Appendix B. Citation checks and classifications were applied to this second group. For reasons that will be discussed later, a separate examination was made of the citations of articles concentrating on behavioral economics. In Section III, I discuss the results and implications of that second study.

At this point, however, it is important to ask whether anything of importance can be gleaned from this methodology. Clearly a great deal of caution is in order, but I believe the answer is yes. I advise caution because there are a multitude of ways in which economic reasoning, and even specific law and economics works, may influence judges without resulting in a citation. For example, judges, clerks, and attorneys may have been exposed to the economic approach and this may be reflected in the logic expressed in an opinion. Thus a lack of citation does not mean a specific work was not influential.

In addition, if a court has already adopted a position that is consistent with a law and economics approach, but it did not rely on economics when the position was initially adopted, the court may have little incentive to turn to economics for support. For example, it is fair to say that a law and economics approach is one that favors more frequent enforcement of liquidated damages clauses.[13] But if a court already has adopted that approach, it is less inclined to feel the need to bolster its position by noting the economic logic

11. This number may be misleading. Although there were nineteen instances of "influence," the cases only cited a total of nine works. *See* Harrison, *supra* note 1, at 80.

12. This reflected my own belief that law professors wrote to influence law and would therefore be relied upon by judges. Now, of course, I recognize the lack of logic in this deduction.

13. *See* RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW 127–130 (7th ed. 2007).

offered by scholars in the field.[14] In fact, one would expect greater appeal to outside authority to occur when a court is inclined to modify the law or prefers to resist an existing trend.

Perhaps the best example of this phenomenon is reliance on the notion of the efficient breach.[15] The theory of the efficient breach provides an economic justification for awarding expectancy damages but no more. As of late 2011, using the database "allcases," the term "efficient breach" was found 131 times. Several of the earliest "hits" were in the context of decisions involving liquidated damages. The courts cited a well-known article on that subject by Charles Goetz and Robert Scott, the title of which included "efficient breach."[16] The first example of the use of the term in a judicial opinion that seemed to suggest approval of the economic theory was not until 1984.[17] Yet the expectancy measure of damages was established well over a century before that time.[18] In short, well-settled law is not likely to require a great deal of defense or explanation by way of academic authority.

Conversely, as a general matter one would expect more cites to scholarship when an area of law is in flux. A lower court adopting a novel or even slightly varied version of an existing rule may well feel that citations and discussion will lower the risk of reversal. Similarly, a court resisting a trend in the law may feel inclined to demonstrate scholarly support for its position. For example, one item in the original sample was Richard Epstein's 1984 article, "In Defense of the

14. For additional discussion on enforcement of liquidated damages clauses, see Kenneth W. Clarkson, Roger LeRoy Miller & Timothy J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351; Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

15. The logic of the efficient breach goes like this: Suppose *A* contracts to sell a car to *B* for $2000. The car is to be delivered in one week. When performance is due, the market value of the car is $2500. At the same time, *C* offers *A* $3000 for the car. Under the efficient breach theory, *A* should breach the contract with *B*, pay $500 in damages to *B*, and sell the car to *C*. This outcome means *A*'s position is improved, *B* is not worse off, and *C* is also better off by virtue of receiving a car which *C* values in excess of $3000. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 189–90 (3rd ed. 2000). Of course, for the breach to be efficient in the sense of increasing or leaving constant the utility of all participants, the monetary compensation received by *B* must offset the loss in utility associated with the breach. There is no reason to assume this is the case.

16. Goetz & Scott, *supra* note 14.

17. Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 1159 (Cal. Ct. App. 1984).

18. *See* A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 217–19 (2003).

Contract at Will."[19] The article was written when there appeared to be a trend toward changing the default position that employment contracts were terminable at will.[20] Since the first iteration of this study it has become the most cited *article*[21] in both the original and expanded sample and is always cited to support the terminable-at-will standard.[22]

Another limitation is that much of what is identified as economics is simply logic that one can apply without adopting a formal economic perspective or referring to economic sources at all.[23] For example, a great deal of contract law is about risk allocation. Thus it responds to questions like: Is there liability for consequential damages? Is the defendant liable even though an unexpected event occurred that made performance more onerous? These issues were dealt with well before law and economics scholars began writing about them. And, for the most part, courts understood the concept of allocating the risk to the party best able to bear it or insure against it. The point is that courts seemingly unaffected by modern economic arguments may tend to find other ways to achieve the same outcome. In a sense these factors explain the focus of this article. It is intended to be more about the influence of law and economics scholarship on contract law than an assessment of the general presence of economic reasoning by those deciding contract law matters.

One final factor that falls into this general category of disclaimers is a function of the twenty-five years between the initial study and this follow up. Writing about opinions in 1987 meant studying the works of judges who most likely were only moderately, if at all, acquainted with the "law and economics" movement. It seems equally likely that the attorneys attempting to persuade those judges were only slightly more familiar with overtly economics-based arguments. Thus if economics played a role, there was a much greater likelihood it would be based on the scholarship of the

19. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

20. *See generally* Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984) (noting that employees formerly terminable at will were being afforded some job security).

21. Judge Posner's *The Economic Analysis of Law* remains the most frequently cited *work*.

22. Citations are found in Appendix A.

23. Richard Posner makes the case that much of the common law was efficient well before the advent of the theory of law and economics. POSNER, *supra* note 13, at 249.

day, rather than on a generalized understanding of law and economics by those involved.

Twenty-five years later, the situation may be quite different. In this period, an economic approach is discussed in most law schools. Even those soon-to-be-judges and attorneys who have not taken a formal course in law and economics are likely to have been subjected to concepts like efficient breach or the economics of reliance. This factor would lean toward less citation, which could be misleading in terms of influence. In other words, law and economics scholarship might play a role in a decision by becoming part of the intellectual consciousness of a judge or an attorney, rather than by the direct influence of a single scholarly work.[24]

With these limitations in mind, each reader may have different interpretations of the results. Two things seem clear. First, despite limitations on what may be inferred from citation frequency, it seems likely that citations to a sample are a general indicator of the tendency to rely on scholarship in a particular field. Second, citations to works that rely on a mode of reasoning will be correlated with the more general influence of that type of reasoning.[25] Here again, however, caution is advised. Once scholarship is cited to support a position, future courts may simply refer to the earlier citing case rather than to the scholarship. Consequently, a decline in citations does not mean the influence of the scholarship has declined.

One general conclusion is that citation to law and economics scholarship in the context of contract law opinions is not a common occurrence. In 1987, the original fifty-eight works had been cited seventy-six times. Twenty-five years later, the citation count for the original sample had grown to 204. Reliance on Judge Posner's *The Economic Analysis of Law* has increased proportionately when compared to the other works in the study. Omitting the citations to Judge Posner's book, the citation count for the initial study drops to fifty-seven, and in the follow-up to 132. Evidence of direct influence of law and economics scholarship is also rare. As already

24. This effort does not include a comparison of the influences of different approaches to contract law. For example, no effort has been made to compare the influence of law and economics scholarship with relational contracts scholarship. Interestingly, under "allcases" using WestLaw, the term "relational contract" is found twenty-two times as of December 2011. In many instances the citation is to an article by Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981), which is itself fairly regarded as part of the law and economics literature.

25. Empirical assessments based on *relative* frequency of citation of works representing different contract law philosophies might be an interesting undertaking. These are not part of this effort.

noted, in the original study I found nineteen instances in which a court seemed to be expressly influenced by an economic argument.[26] In the past twenty-five years there were twelve more of these instances. This may not be unique to law and economics but is noteworthy because no other approach to law that I know of has been as broad in scope and as intellectually aggressive with its announcements of what the law *should* be.

When writing twenty-five years ago, I noted five trends in contract law: erosion of the terminable-at-will rule, greater reliance on promissory estoppel, greater incidence of excuse from performance when it has become more difficult, routine awarding of specific performance, and enforcement of liquidated damages clauses.[27] It was impossible to conclude that the economic literature at the time had played much of a role except perhaps in the case of liquidated damages clauses.[28] Although the influence of law and economics scholarship is doubtful, the trends themselves are generally consistent with the teachings of law and economics.

II.
THE SHIFTING NATURE OF LAW AND ECONOMICS SCHOLARSHIP

When this effort was initially undertaken, mainstream law and economics was linked closely to the idea that individuals are rational maximizers of self-interest.[29] Rationality in this context means the ability to make consistent decisions.[30] Self-interest is a bit difficult to pin down, but essentially it means not making decisions simply out of a sense of duty[31] or making choices that are "counter-preferential."[32] Thus individuals were assumed to be rational maxi-

26. This trend did not increase in the post 1987 period. See Section IV, *infra.*

27. Harrison, *supra* note 1, at 83–98.

28. Harrison *supra* note 1, at 98.

29. For a general discussion of these terms, see Jeffrey L. Harrison, *Egoism, Altruism and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309 (1986).

30. More specifically this means decisions that do not violate the law of transitivity. Thus if one prefers apples to oranges and oranges to pears, he would also prefer apples to pears.

31. *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1527 & n.9 (1984).

32. Under some definitions of self-interest, it is impossible not to act in a self-interested fashion. Every decision, even one that seems to be altruistic, is seen to be consistent with "psychic utility." Amartya Sen, for one, argues for the possibility of counter-preferential choice. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 328 (1977).

mizers of their own utility.[33] Although prior to 1987 some questions were raised about what "rationality" and "self-interest" meant, the behavioral underpinnings of the economic analysis of law were relatively fixed and simple. In fairness it is important to note that pioneers in the field of law and economics understood that the validity of their analysis hinged on the legitimacy of these assumptions.[34]

During the past twenty-five years, these assumptions have come under increased pressure from sociologists and economists. More specifically, the fields of behavioral and experimental economics have been closely examining the rationality assumption. Even more recently, scholars have questioned what it is that people maximize.[35] In particular, if people seek to maximize utility, what does that mean and what sorts of things are consistent with that goal?[36]

The current survey consequently takes place in the context of a more skeptical law and economics literature than that which existed twenty-five years ago. This change in the tone of the scholarship is one variable that may affect reliance on law and economics scholarship. Today it has a much more inward-looking quality. Two examples of this more introspective approach come to mind: behavioral economics and the even more recent focus on the determinants of happiness. It is important to examine these two areas, albeit briefly, to understand the ways they may alter judicial dependence on conventional economics scholarship.

A. Behavioral Economics

There is an extensive behavioral economics literature that I am only able to touch on briefly here.[37] Nevertheless, the essence of

33. *Id.* at 322–24. Utility, as will be noted below, usually refers to expected as opposed to actual utility. It is important to note that the utility of one person may be tied to the perceived utility of another. In other words, a parent may increase her utility by pleasing a child. Thus self-interest does not preclude interdependent utility functions.

34. For a brief survey see Harrison, *supra* note 29, at 1320–22.

35. *See infra* pp. 13–16.

36. *See generally* Jeffrey L. Harrison, *Happiness, Efficiency and the Promise of Decisional Equity: From Outcome to Process*, 36 PEPP. L. REV. 935 (2009).

37. There is a vast number of articles in law alone that address the implications of behavioral economics. One of the earliest is Harrison, *supra* note 29. *See also* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 (2007); Grant M. Hayden & Stephen E. Ellis, *Law and Economics After Behavioral Economics*, 55 U. KAN. L. REV. 629 (2007); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 Vand. L. Rev. 1653 (1998); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Sci-*

what has been discovered falls into two categories. One is that even if the assumption of self-interest is accepted, it is not clear what that means. Maybe the best examples are games indicating that people react to what they perceive as the fairness of an outcome. The second category concerns whether people are capable of rational choices.[38]

1. What is Self-Interest?

The problem with defining self-interest is illustrated by reference to ultimatum games.[39] In the simplest version of these games, a certain amount of money is given to one party who must obtain the permission of a partner in order to keep the sum. The initial party is given a chance to make a one-time offer of a portion of the money in order to persuade the partner to allow him to keep the rest. If the partner says "no," neither party keeps any amount of the sum offered. One would expect the offering party to offer a very small amount and for the other party to say "yes." The explanation of this is that a "yes" answer leaves both participants better off than a "no" answer. The actual results, however, are that the offering party generally offers more than a very small amount, but when he does offer a small amount, that offer is rejected. In other words the offeree opts to be worse off as a financial matter, a decision inconsistent with the rational self-interest maximization assumption.[40] There is, however, a way this decision can be viewed as consistent with the assumption. The offeree who turns down the low offer includes a sense of fairness in his or her utility function and actually is "better off." The problem is that this is not the conventional way

ence: Removing the Rationality Assumption from Law and Economics, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002).

38. This discussion begins *infra* note 45.

39. *See generally* Werner Guth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 368 (1982) (discussing individual self-interest in single and multi-stage bargaining games).

40. An allocation that leaves at least one party better off and no one worse off is said to be Pareto Superior. An allocation leaving at least one party worse off is Pareto Inferior. When there are no allocations that could be Pareto Superior, the current allocation is said to be Pareto Optimal. Paretian standards of efficiency are attractive to some because they avoid the problem of interpersonal comparisons of utility. In the example, rejecting the offer would appear to be a Pareto Inferior move because it entails giving back the money offered. For a brief history of efficiency standards, see Harrison, *supra* note 36, at 942–46.

economics is applied to law. Self-interest is typically a very narrow concept that does not allow for complex emotional reactions.[41]

A more interesting version of the ultimatum game is a classic designed by Richard Thaler. Here subjects are asked the following question:

> You are lying on the beach on a hot day. All you have to drink is ice water. For the last hour you have been thinking about how much you would enjoy a nice cold bottle of your favorite brand of beer. A companion gets up to go make a phone call and offers to bring back a beer from the only nearby place where beer is sold (a fancy resort hotel) [a small run-down grocery store]. He says that the beer might be expensive and so asks how much you are willing to pay for the beer. He says that he will buy the beer if it costs as much or less than the price you state. But if it costs more than the price you state he will not buy it. You trust your friend, and there is no possibility of bargaining with the (bartender) [store owner]. What price do you tell him?[42]

In Thaler's experiment, the median answer was either $2.65 or $1.50. The higher amount was offered by those buying from the fancy resort and the lower amount was offered by those buying from the run-down store. The beer, however, is exactly the same. There are two possible interpretations, neither of which is in accord with the standard economic model. One is that it exposes irrationality. In other words, how can the same beer be worth both no more than $1.50 but also up to $2.65? The more promising possibility is that the respondents had a sense of a fair price depending on who the seller was, and this entered into their valuation of the beer.

In the realm of economic analysis, the same type of influence may affect what is referred to as the efficient breach. Under that theory, a party will breach a contract if he or she could compensate the non-breaching party to the level of his expectancy and still profit by virtue of the breach. This concept has been under fire for some time, but not for reasons related to behavioral economics.[43] What behavioral economics suggests is that the decision to breach may not be a simple matter of profit and loss. The potentially breaching party could actually have a sense of whether it is fair to breach and compensate the non-breaching party with the lowest

41. *See generally* Harrison, *supra* note 29, at 1320–26.

42. RICHARD THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES IN ECONOMIC LIFE 31 (1992).

43. *See, e.g.*, Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 963 (1982).

possible compensation consistent with leaving that party no worse off, at least monetarily. More specifically, one could argue that it is inefficient to breach in these instances because of the negative psychic impact on the potentially breaching party. Put differently, a party may be fully conscious of the fact that his or her wealth will increase by breaching but also sense that breaking a promise is inconsistent with his or her own value system.

2. Questions of Rationality

Another facet of behavioral economics has less to do with what people value and more to do with their capacity to process information and make decisions that maximize utility. The importance of this problem is best understood in the context of the theory of "revealed preferences." In effect the standard economic model discovers what people prefer by examining the choices they make. Under the classical model, choice and preference are locked together. Thus when a choice is made it must be the one that delivers the highest level of utility or satisfaction to the chooser.[44] Studies conducted in behavioral economics suggest this is not always the case.

A great deal has been written about bounded rationality and cognitive biases.[45] As the term suggests, there are a number of limitations on arriving at a rational outcome. Indeed, it may be rational to be irrational when the costs in terms of time and effort exceed the marginal benefit.[46] Even aside from the costs of "rational" behavior, the ability to integrate and interpret information may simply be beyond the capacity of many people. More importantly, there are biases that tend to pull people away from the rational outcome. For example, some exhibit an optimism bias in that they assume incorrectly that the probability of a favorable outcome is higher

44. *See* Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference,* 15 ECONOMICA (n.s.) 243 (1948); Paul A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 ECONOMICA (n.s.) 61 (1938). *See generally* Harrison, *supra* note 29, at 1316–21.

45. *See, e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); MASSIMO PIATTELLI-PALMARINI, INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS 4–5 (1994); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

46. *See* Jean Tirole, *Rational Irrationality: Some Economics of Self-Management*, 46 EURO. ECON. REV. 633, 644–46 (2002); Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1 (Feb. 1962). In other words, decisions that appear to be inconsistent or to violate the law of transitivity may actually be rational when the costs of additional time and information are factored into the analysis.

than it actually is.[47] In other cases, individuals may be susceptible to an anchoring effect.[48] That is, when asked to make a decision or predict an outcome, they do not start from a clean slate but from an anchoring point and adjust from there.

These biases have been studied and have important implications for public policy.[49] Some of this work was completed before the first citation study in 1987.[50] It was only after that time, however, that it began to find its way into mainstream legal scholarship. What this means is that, since the first study, the range of what may fairly be called law and economics literature has changed. On balance the new work is critical of the underlying assumptions that may have made the initial law and economics writings attractive to some. One of my aims is to determine whether this work has had an impact on the willingness of courts to adopt the teachings of law and economics scholarship.

B. Happiness and Utility

More recently, scholars have begun considering a topic that is even more fundamental than advances in behavioral economics. What does it mean to be better off? This leads to more specific questions. For example, how do you measure whether someone is better off? Does better off mean a subjective measure of happiness or is it a function of objective measures like longevity, the availability of heath care, or a healthy diet?[51] Revealed preference theory

47. *See, e.g.*, TALI SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN (2011).

48. *See* KAHNEMAN, *supra* note 45, at 119–28.

49. See materials cited *supra* note 37.

50. For a discussion, see Harrison, *supra* note 29, at 1352–61.

51. *See generally* ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985) (discussing the role of status as a motivator in individual behavioral choices); BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT HUMAN WELL-BEING (2002); DANIEL GILBERT, STUMBLING ON HAPPINESS (2006); JONATHAN HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM (2006); JENNIFER MICHAEL HECHT, THE HAPPINESS MYTH: WHY WHAT WE THINK IS RIGHT IS WRONG 133–46 (2007) (discussing literature on the linkage between material objects and happiness); RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2005); MATTHIEU RICARD, HAPPINESS: A GUIDE TO DEVELOPING LIFE'S MOST IMPORTANT SKILL (Jesse Browner trans., Little, Brown & Co. 2006); Jeremy A. Blumenthal, *Law and Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 165–81 (2005) (discussing social science research regarding people's ability to predict their future feelings); Richard A. Easterlin, *Explaining Happiness*, 100 PROC. NAT'L ACAD. SCI. 11176 (2003); Richard A. Easterlin, *Income and Happiness: Towards a Unified Theory*, 111 ECON. J. 465 (2001); Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 J. ECON. BEHAV. & ORG. 35 (1995); *Interpersonal*

comes into play here as well. The standard economic assumption is that people maximize utility by making choices they deem most satisfying. And, the theory goes, we know what maximizes that utility by observing choices. The problem is that the way one anticipates feeling as a result of a choice—in this case, the choice to make a contract—does not always turn out to be how one actually feels. In short, expected utility, the realm of traditional economic analysis, does not necessarily match up with actual utility or happiness.[52]

This realization is at the heart of ongoing studies about the factors that account for happiness. For example, according to some theories, people have a set level of happiness that they may rise above or sink below, but only temporarily.[53] The idea that contracts are enforced to give a non-breaching party his or her expectancy becomes entangled with the possibility that one may be just as happy in the long run even if subject to a breach of contract without compensation. As extreme as it may seem, this gives rise to the question of just how important it ultimately is to enforce all contracts.

For example, suppose you have a contract to purchase a new fancy sports car to be delivered in two months. At the time of expected delivery, the seller informs you that the car has been sold to someone else and will not be replaced. Standard contract remedies require awarding you the difference between the price you would have paid for the car and what you will have to pay for a substitute. But what we know now is that the successful purchase of the car may have resulted in only a short-term boost in happiness. On a practical level, you can relate to this by thinking of the number of times you very badly wanted something—say, a new coat or jewelry—but were disappointed. In a few months, the sense of disappointment or desire is extinguished and the article actually turns out not to be as important as it seemed.

Comparisons of Well-Being (Jon Elster & John E. Roemer eds., 1991); Tiffany A. Ito & John T. Cacioppo, *The Psychophysiology of Utility Appraisals*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 470 (Daniel Kahneman et al. eds., 1999); Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERS. & SOC. PSYCH. 527 (2003). The most comprehensive review of the literature is found in Peter Henry Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 405 (2010).

52. *See* Harrison, *supra* note 36, at 946–48.

53. Richard E. Lucas et al., *supra*, note 51. The notion of a set point is debatable as individuals may readjust their expectations. *See* Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn't be (Just) about Pain and Suffering*, *in* LAW AND HAPPINESS 195 (Eric A. Posner & Cass R. Sunstein eds., 2010).

Or consider one of your most miserable experiences—say, a long hike during which it rained and you became lost. At the time, it was the source of great unhappiness or disutility. Later, however, the experience brings about a sense of achievement. The sense of having experienced the negative event actually results in positive feelings. As it turns out, studies indicate that there is a difference between an experience and the memory of that experience.[54] Time can reshape your feelings. The question then becomes: what is the relevant happiness or utility, that which occurs contemporaneously with the experience or the feeling one has about it in years to come?

In reality there are at least three ways to look at this. There is the difference between expected utility (decisional) and what actually happens. In addition there is a difference between how you felt at the time of the experience and how you recall it. Finally there may be unpleasant experiences that are accurately recalled but result in a sense of pride or happiness, even if it is only the result of being able to discuss the experience with others. These studies of happiness have broad implications for contracts that are just beginning to be fleshed out. For example, promissory estoppel is based on the idea that people's reliance on promises may be to their detriment. The suggestion is that reliance on a promise has made their positions worse. It is likely that when people hear that a promise has been broken, they are less happy than had they learned otherwise. There is little distinction here between being injured and suffering some other type of loss. At least some studies suggest that people "get over" these losses and return to their *ex ante* state of happiness. It has already been suggested that these findings warrant a reassessment of tort remedies.[55] The logic of this argument applies equally to contract remedies, at least in non-commercial settings. Enforcing promises may not make that much difference and expectancy may be overrated as a contract remedy.

I want to avoid too broad of a statement about the personal impact of enforcing or not enforcing awards of contract damages. Contract law and even promissory estoppel play an important role in reducing transaction costs. If these contracts and promises are

54. Daniel Kahneman et al. capture this distinction, distinguishing "decision utility" from "experienced utility." *See* Daniel Kahneman, Peter P. Wakker & Rakesh Sarin, *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375 (1997).

55. *See* Andrew J. Oswald & Nattavudh Powdthavee, *Death, Happiness, and the Calculation of Compensatory Damages*, *in* LAW AND HAPPINESS 217 (Eric A. Posner & Cass R. Sunstein eds., 2010).

not enforced, transaction costs and risk would increase. The increase in costs of transacting may lead to fewer resources available for other sources of happiness. In addition, risk itself is typically something people pay for or avoid. In effect, even if people eventually reach their original levels of happiness, they may incur happiness-reducing costs in that process. If one adds to this that the parties are not individuals but business entities, the analysis is even murkier.

The question in the context of this study is fairly straightforward. Since this survey was initially conducted, both behavioral economics and happiness studies have captured the attention of a great number of economists and those who apply economics to law.[56] The overall impact, if any at all, would be to decrease the attractiveness of traditional economic models as a supplement to judicial analysis. I consider this hypothesis in the section that follows.

III.
SURVEY RESULTS

A. An Overview

One must be cautious about making claims about the results of an informal study like this one. Nevertheless, a few judgments are relatively easy to make. Some are about quantitative matters and some are more qualitative and, admittedly, even impressionistic. With respect to quantitative matters, based on the sample examined here, one cannot conclude that law and economics scholarship has increased its citation frequency since the initial study twenty-five years ago. As noted above, with respect to the original sample there were seventy-six citations as of 1987. Since that time there have been 127 more. In the initial period, citations to Judge Posner's book accounted for 27% of the citations. In the second period, his book (in all editions) accounted for 40% of the citations.

Because it is difficult to compare these time periods in any exact way, I developed a standard of measurement. The average age of the works examined in the initial study at the time of that study was eleven years. Since there were fifty-eight works examined, a computation can be made for what I am going to call "article-years." This can be thought of as the cumulative number of years all articles were available for citation. The first sample included a total of

56. See materials cited at *supra* notes 37 & 51.

638 article-years.[57] If the seventy-six citations are divided by 638 article-years the result is 0.12 citations per work per year.

In the twenty-five year period since the initial study, there were 127 citations to those same works. Although there were more total citations, there were also substantially more article-years since each article is now twenty-five years older.[58] In fact, twenty-five years multiplied by fifty-eight works means there were 1,450 article-years. Dividing the number of citations by article-years results in a citation rate of 0.087 citations per article-year. In short, the articles in the initial sample have been cited more often overall in the second period but substantially less often per article-year than they were in the period leading up to 1987. Of course this may not be indicative of an ultimate loss of influence. As noted earlier, once a case has been cited, later courts may simply cite the case in which the work was originally cited.[59] This may explain a decline in citations.

Another reason for not equating these quantitative results with influence relates to the different perspectives one may take. If the total number of citations is an indicator of influence, the second twenty-five year period would appear to be one of greater influence. After all, law and economics as an *area* of scholarship is cited more often. This could be strictly a function of having more years to be influential but that would not distract from the overall or gross impact. On the other hand, there are more years and fewer cites per article-year than in the initial period. This would suggest that the reliance on law and economics, while obviously still positive, is declining. In effect each article becomes less influential as time passes.[60] To put this differently, with respect to the original study, articles were available to be cited during a much shorter period of time than in the second study. In breaking the analysis into averages, my goal is to make sure that the original sample's impact is not understated simply because it was available for fewer years.

Another hypothesis that could explain the declining citation rate of the original sample is that the earlier works are being replaced or crowded out by newer ones. There is no methodologically sound way of determining if this is the case, but in an effort to gain

57. This was calculated by multiplying 58 by 11.

58. In effect twenty-five years were added to the eleven year average found as of 1987.

59. A next step in the analysis would be to focus on those works that have been influential and to determine the frequency of citation of the holding they influenced.

60. One could say that the marginal influence of the sample is still positive but declining.

some insight I selected twenty articles using the same subjective standards used to select the original. Some articles are by the same authors as those in the original sample and others are by younger but prolific scholars.[61] On average, the articles were published eleven years ago, which means a total of 220 article-years. The total number of citations was five, which means an average of 0.02 citations per article-year.[62] In contrast, over the last eleven years the original sample has been cited a total of forty-five times over 495 article-years. This means a citation rate of 0.07 times per article-year. Even if Judge Posner's book, with twenty-one of the total citations, is excluded, the citation rate is 0.05 citations per article per year.[63] If these numbers are representative of the aggregate, one interpretation is that the older articles have *not* been crowded out by newer ones.

There are of course a number of reasons why the more recent works might be cited less frequently by courts. An educated guess is that the original set of articles addressed specific mainstream doctrinal issues in contract law that were likely to be the subject of dispute.[64] Although it is admittedly impressionistic, the more recent articles, or at least those selected here, tend to be more theoretical. Of course theoretical works may lead to several more practical ones that are cited, and their importance will never be fully gauged. As a general matter, the analysis so far suggests that the pre-1990 works in law and economics as they relate to contract law represent the core law and economic scholarship of the area. They are thus more likely to be cited.

Another possible explanation for a lower citation rate is the huge volume of literature in behavioral economics. This literature calls into question some of the basic assumptions of the traditional analysis that characterized most of the works included in the original sample. The more nuanced view of law and economics resulting from the teachings of behavioral economics could result in some

61. The list is found in Appendix B.

62. This rate is calculated by dividing 5 into 220. The average is used here in order to normalize for the different lengths of time articles were available in the first sample as compared to the second sample.

63. There is little doubt that the presence of Judge Posner's *An Economic Analysis of Law* accounts for a great deal of the "power" of the original sample. Because Judge Posner's book has gone through multiple editions one could argue it should be included in both samples. The propositions for which it is typically cited were in the first few editions and it would be misleading to count them as part of the recent sample of scholarship.

64. One can get a feel for this by comparing the titles in Appendix A with those in Appendix B.

hesitation to rely on the earlier and more conventional works. To examine this question, I determined the number of instances the phrases "behavioral economics" and "behavioral law and economics" were used at any time in the "allcases" database. There were only seven citations with the oldest being in the year 2000. Interestingly, two of the seven were citations to a work by Judge Posner.[65]

To further examine this issue, I selected a sample of articles addressing directly the subject of behavioral economics.[66] Again the sample was not random but based on my judgment about which articles were likely to be influential. The thirteen articles selected were cited a total of ten times. Although they were recognized in a positive manner, there was no indication that those articles had been used by judges to reject the conventional economic analysis of contract law in any but a tangential manner.[67] In short, at least based on a citation analysis, one would have to reject the hypothesis that conventional law and economics articles are relied on less frequently because of the onslaught of behavioral economics works.[68]

In one more exercise, I examined the possibility that the rapidly developing literature on happiness as an alternative to expected utility as a measure of utility has had an impact on law and economics citations. Perhaps the most comprehensive treatment of happiness as it relates to law is a collection of articles published by *The Journal of Legal Studies* in 2009, and subsequently published in book form in 2010.[69] These articles were devoted to a variety of topics. Searches using a number of terms resulted in no findings that this literature has had an impact.[70] It may be that it is too soon to detect an impact. On the other hand, the application of that literature to contract law is not as obvious as the application of traditional economics,[71] and most of the theories related to happi-

65. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).

66. These are found in Appendix C.

67. For example, half of the citations were to John D. Hason & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999), which discusses the way in which the presentation of data or information can impact markets. These works comment on the standard economic assumptions but have not yet influenced actual contract rules.

68. In order to be completely accurate, it should be noted that even this hypothesis rests on the assumption that law and economics articles are relied upon less. This is based on citation and cannot account for the other ways in which law and economics scholarship may affect judicial reasoning.

69. LAW AND HAPPINESS (Eric A. Posner & Cass R. Sunstein eds., 2010).

70. The search terms used were the authors' names, the titles of the articles, and the title of the collection.

71. For a detailed discussion, see Harrison, *supra* note 36, at 987–88.

ness and law are insufficiently developed to be operational at this time.[72]

In sum the sample selected twenty-five years ago is cited less frequently. One might posit that those articles have been superseded by more recent scholarship but that does not appear to be the case. In fact, overall, it appears that citation to law and economics works has become less frequent. Hypotheses that this is the result of inroads made by behavioral economics or by happiness studies cannot be supported on the basis of the data collected here.

B. A Closer Look

1. Some Quantitative Observations

A closer look at the data reveals some outcomes that are inconsistent with a view that the influence of law and economics scholarship has declined. For example, in the 1987 study, thirty-three of the citations to law and economics scholarship were by federal courts and fourteen of those were by the Seventh Circuit Court of Appeals.[73] This likely reflected the acceptance by Judges Posner and Easterbrook of the law and economics approach. In the post-1987 period there were sixty-seven citations by federal courts and only nineteen were by the Seventh Circuit Court of Appeals. Although it is not clear that this is statistically significant, the very clear implication is that the influence of law and economics scholarship has spread beyond the Circuit with which it is most readily identified. A specific example of this process is Richard Epstein's 1984 article on terminable-at-will contracts.[74] In the 1987 study, the article had been cited five times and in all instances it was by the Seventh Circuit Court of Appeals.[75] Since then, it has been cited twelve more times and only three of the new citations are by the Seventh Circuit.

While this growing influence of law and economics scholarship holds true from an overall perspective, it is not a uniform phenomenon. One curious example is Anthony Kronman's seminal article on mistake and the duty to disclose information in the context of contract formation.[76] The article presents the traditional economic argument for not requiring parties to a contract to disclose infor-

72. *See generally* Jeffrey L. Harrison, Book Review, 21 U. FLA. J.L. & PUB. POL'Y 413 (2010) (reviewing LAW AND HAPPINESS, *supra* note 69).

73. See Appendix A.

74. Epstein, *supra* note 19.

75. See Appendix A.

76. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); *see also* Jeffrey L. Harrison, *Rethinking Mistake and*

mation that they have invested to gather. Kronman's theory is that people invest in information when they are able to internalize the benefits of that investment. This investment, so the argument goes, assists the process of resources finding their way to their most valuable uses.[77] If parties to a contract were always required to disclose information, they would be unable to internalize the benefits of their information gathering and valuable investment would decline. When information is not discovered by virtue of an investment, there is no efficiency rationale for allowing non-disclosure.[78]

In the 1987 study, Kronman's work was found to have been cited four times. In all cases, it was by the Seventh Circuit Court of Appeals. By 2011 the article had been cited seven more times and all but one of the citations were by the Seventh Circuit Court of Appeals. Although the Kronman article presents an economic rationale for disclosure and non-disclosure, it has typically been cited to support non-disclosure.[79] Of the eleven total citations, seven are found in opinions written by Judge Posner. This suggests that some scholarly works may become favorites of particular judges and be cited whenever a case arises that deals with the issue addressed by the article. Thus a work of scholarship may become more frequently cited as its appeal spreads to judges in other courts or it may be repeatedly cited by the same judge as it becomes part of his or her mental library. In the second case, the work is less influential than in the first case. In addition it is important to keep in mind that the scholarship may fall out of the picture completely as subsequent courts cite the court that was initially influenced.

As a more general matter, the patterns of citation suggest that law and economics scholarship is relied on more frequently when the law is not clear or is in the process of change. As already noted, wide citation to Richard Epstein's article on employment termination likely is a function of change in the law of terminable-at-will employment. The article by Charles Goetz and Robert Scott on liquidated damages is also cited relatively frequently, and in this instance the law seems to be on the move as well.[80]

Nondisclosure in Contract Law, 17 GEO. MASON. L. REV. 335 (2010) (discussing Kronman's article).

77. Kronman, *supra* note 76, at 2.

78. *Id.* at 13–14.

79. The lone exception appears to be *United States v. Mahaffy*, No. 05-CR-613, 2006 WL 2224518 (E.D.N.Y. Aug. 2, 2006).

80. Goetz & Scott, *supra* note 14. In part this trend can be traced to a policy of enforcing the liquidated damages clause if the clause is reasonable at the time of contracting or at the time of the breach. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981); *see also* United States v. Hayes, 633 F. Supp. 1183, 1185 (M.D.N.C.

On the other hand, the substance of Kronman's article explains why well-settled law makes economic sense. Scholarship defending the s*tatus quo* when it is not under attack is not as likely to be needed by a court.

2. A More Qualitative Examination

Although the numbers suggest varying conclusions with respect to the influence of law and economics, an examination of actual decisions indicates that an economic way of thinking about issues has penetrated judicial reasoning. Here the focus is not on the number of citations. Instead, the inquiry centers on the development of an economically influenced manner of reasoning and discussion and on the diverse courts which employ this reasoning. For example, although the theory of efficient breach hardly explains the evolution of the expectancy measure of damages, courts have an appreciation of how the theory supports expectations. Thus as Justice Mosk of the Supreme Court of California observed in a 1995 opinion, "The efficient breach occurs when the gain of the breaching party exceeds the loss to the party suffering the breach, allowing movement of resources to their more optimal use. Contract law must be careful 'not to exceed compensatory damages if it doesn't want to deter efficient breaches.'"[81] In gauging the impact of law and economics on the vocabulary of courts, most telling is the trend in the use of the term. As noted earlier, "efficient breach" is used 131 times as determined by the methodology employed

1986) (stating that it has been the modern trend to allow liquidated damages clauses in contracts); Rohlin Constr. Co. v. City of Hinton, 476 N.W.2d 78, 79 (Iowa 1991) (recognizing a change in contractual interpretations consistent with the trend of favoring liquidated damages).

81. Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 682 (Cal. 1995) (Mosk, J., concurring in part and dissenting in part) (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 107–08 (3d ed. 1986)). At the heart of the efficient breach notion is that no party is made worse off (at least in a monetary sense) by virtue of the breach. *See also* Allapattah Servs., Inc. v. Exxon Corp., 61 F. Supp. 2d 1326 (S.D. Fla. 1999) (noting that intentional breaches are sometimes encouraged when they are efficient and wealth-enhancing).

This is not to say that every court adopting the economic view has applied it correctly. One case in which the application appears to be incorrect is *Specialty Tires of America, Inc. v. CIT Group/Equipment Financing, Inc.*, 82 F. Supp. 2d 434 (W.D. Pa. 2000). In *CIT Group*, the court reasoned that it was efficient to excuse the performance of a party who would otherwise be in breach of contract because the plaintiff would simply be put in the position it was in before making the contract and, thus, would be no worse off. 82 F. Supp. 2d at 441. In actuality, the plaintiff was made worse off if one views the making of the contract as having created a legitimate expectancy.

here. The term was only used eleven times as of 1987, when the initial study was conducted.

Similarly, in the context of an early termination fee, a federal court in New York noted the usefulness of penalty clauses:

> There are several potential benefits to an agreed punitive measure of damages. A party who wants to convince others of her trustworthiness may choose to accept a penalty clause in order to increase her credibility. Similarly, a penalty clause may compensate a seller for a high risk of default, enabling the seller to take greater risks and charge lower prices. In addition, a penalty clause may be the only means to provide true compensation to a promisee whose idiosyncratic wants would not be compensated by the standard expectation measure of contract damages.[82]

The court expressed skepticism about what it termed the "Chicago" approach to the issue but seemed to accept possible economically beneficial effects of such clauses.[83]

Economic reasoning has also been brought to bear in the analysis of contingency fees. Thus according to the Texas Supreme Court:

> Attorney contingency fee contracts serve two main purposes. First, they allow plaintiffs who cannot afford to pay a lawyer upfront to pay the lawyer out of any recovery. Second, because they offer the potential of a greater fee than might be earned under an hourly billing method, such contracts compensate the attorney for the risk that the attorney will receive no fee whatsoever if the case is lost. The lawyer in effect lends the value of his services, which is secured by a share in the client's potential recovery.[84]

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82. Spirit Locker, Inc. v. Evo Direct, LLC, 696 F. Supp. 2d 296, 306 (E.D.N.Y. 2010).

83. *Id.* at 307–08. As in the case discussed immediately above, this court also stumbled a bit on its economic analysis. One of its concerns about liquidated damages clauses is that they may discourage the efficient breach. *Id.* at 305. However, this seems unlikely. A liquidated damages clause can be seen as giving one party the "right" to performance similar to specific performance in that the party that would prefer to breach will not do so. Like a right to specific performance, parties may bargain for liquidated damage amounts that do not deter the efficient breach. *See* JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 151–53 (5th ed. 2011).

84. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (internal citations omitted); *see also In re* McCoy Farms, 417 B.R. 17, 23 (Bankr. N.D. Ohio 2009); Ketchum v. Moses, 17 P.3d 735, 742 (Cal. 2001). *But see*

Similar economic reasoning has been advanced to support the use of form contracts. As an example, in a recent Ohio case, the court observed:

> [T]he law does not require that each aspect of a contract be explained orally prior to signing the contract. A party to a contract is responsible for reading what he signs . . . . Nevertheless, the Ohio Supreme Court has declined to require more specific disclosures when arbitration is concerned, reasoning that form contracts lower transaction costs and benefit consumers through lower prices.[85]

More broadly, in *Bidlack v. Wheelabrator Corporation*,[86] the court noted the potential application of the backbone of law and economics—the Coase Theorem[87]—when it discussed the possibility that parties can contract around court-determined rules: "We should recognize initially that, when those affected by a chosen default rule can easily bargain around it to agree to a mutually beneficial course, the rule choice will generally make little difference to the parties' actual agreement."[88] Indeed courts have recognized the relevance of the Coase Theorem forty-seven times.[89] This may not

Kenseth v. Comm'r, 114 T.C. 399, 413 (T.C. 2000) (finding attorneys' fees to be merely a cost of litigation).

85. Wallace v. Ganley Auto Grp., No. 95081, 2011 WL 2434093, at *6–7 (Ohio Ct. App. June 16, 2011). The best-known examples of judicial recognition of the capacity of form contracts to lower transaction costs are *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) and *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

86. 993 F.2d 603 (7th Cir. 1993).

87. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). For a discussion of the Coase Theorem see JEFFREY L. HARRISON & JULES THEEUWES, LAW & ECONOMICS 81–100 (2008).

88. *Bidlack*, 993 F.2d at 612.

89. This is based on a search for "The Problem of Social Cost" in the "all-cases" database of Westlaw. Not all of these instances involve contract law but, ultimately, the Coase Thereom is about the capacity of market transactions to settle what would otherwise be legal disputes. Another example, albeit in the context of a tort case, is *Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So. 2d 857 (Miss. 1988). The case involved rice damaged by coal dust. The Mississippi Supreme Court noted:

> Again assuming an *ex ante* perspective, which party could have prevented this loss at the least cost? Assuming, for example, that it was necessary to fumigate the rice and permit inspection by SGS Control Services, the buyer's agent, our judicial task would be to identify factually the various precautionary options open to the parties that might have prevented the contamination loss, and, as well, the cost of each such option. Considering then those options open to Comet Delta and, in turn, the options available to Pate, the law's burden ought fall upon that party which, at zero transaction costs, could have prevented the loss at the least cost. That party is said to be the least cost risk bearer, to use the increasingly familiar lingo. *Cf.* Goetz, *Law and Econom-*

be an impressive number for an article as well known to economists and lawyers as Coase's classic,[90] but for the first twenty years of its existence—from 1960 to 1980—it was cited but six times.[91]

Also pertinent as a measure of the penetration of economic analysis into judicial opinion is the use of the term "transaction costs." Transaction costs are the costs incurred in reaching an agreement.[92] High transaction costs deter contract formation and low ones make contract formation more likely. The most well-known application of transaction costs is found in Coase's *The Problem of Social Cost*.[93] Again using the database "allcases," the term appears a total of 653 times.[94] Prior to 1990, the term was used 139 times times, and before 1960, the year *The Problem of Social Cost* was published, the term appeared but once.[95] By 1987, the date of the initial study, the term had appeared ninety-three times. In the twenty-five years since 1987, the usage of the term tripled over the number of times used since 1987. Clearly transaction costs have become part of the day-to-day vocabulary of courts.

These examples are far from exhaustive. The breadth of the topics addressed, as well as the jurisdictions represented, suggest

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ics, 118-27 (1984). In other words, that party which, *ex ante,* could have prevented the loss at the least cost should be burdened in law with the risk and consequently the loss . . . . The seminal discussion of this idea is Coase, *The Problem of Social Cost,* 3 J. Law & Economics 1, 1–28 (1960).

Id. at 862.

90. By contrast the article has been cited 3100 times in works of legal scholarship. This is based on searching "The Problem of Social Cost" in the Westlaw "TP-ALL" database.

91. *See, e.g.*, Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 n.7 (2d Cir. 1968). Interestingly, this first citation was by Judge Friendly, who regarded the Coasian solution as "unlikely to occur in real life." *Id.*

92. The concept was first introduced by Ronald H. Coase in his 1937 article *The Nature of the Firm* using the terminology "marketing costs." Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA (n.s.) 386, 394 (1937). In his 1960 article, *The Problem of Social Costs*, he refers to the "cost of market transactions." Coase, *supra* note 87, at 15. The term "transaction costs" seems to appear more generally in both his book and short articles. *See generally* Ronald H. Coase, THE FIRM THE MARKET AND THE LAW 174–79 (1990); Ronald H. Coase, *The Nature of the Firm: Origin*, 4 J.L. ECON. & ORG. 3 (1988).

93. Coase, *supra* note 87, at 15.

94. Specifically excluded were cases that also included any of the following terms: "bank," "institution," "refinancing." These terms would likely be found when transaction cost actually refers to a fee. Not all instances in which the term was used were examined but a random check of seventy-five instances indicated the usage was consistent with the Coasian meaning.

95. In this one instance the term is actually "financial transaction costs," which is not consistent with modern usage. State ex rel. Cowles v. Butts, 170 So. 715, 716 (Fla. 1936).

that economic reasoning, or an effort to apply it, has become common in opinions dealing with contract matters. This is the sort of subterranean effect that may not be fully appreciated by focusing only on citations.

CONCLUSION

Revisiting a work you completed twenty-five years ago can be a sobering exercise. That early examination of the first wave of law and economics scholarship suggested that citation was infrequent. There are a number of explanations, including the most important one: much of contract law was consistent with the teachings of law and economics. Still, two interesting conclusions seem to be relatively safe. First, law and economics was not responsible for any of the current trends in contract law at the time. Second, although citations were not frequent, they were disproportionately found in courts that were promoting a law and economics perspective. Nevertheless, a citation count alone may not fully capture long-term effects.

The current effort produced a more complex combination of results. With respect to the original sample of scholarship selected, citation frequency has declined. It does not appear that these earlier works have been replaced by newer ones or that they have been affected by the more nuanced view offered by behavioral economics. As in the initial study, it would be difficult to conclude that law and economics scholarship has played a role in *shifting* any basic contract law tenets.[96]

Principally law and economics has provided a rationale for already existing positions. This is somewhat consistent with the view that common law judges, who were not familiar with economics in a formal sense, either intuitively responded to the logic or coincidentally arrived at economically sensible outcomes.[97] More importantly, this update suggests that citation frequency may not be the best measure of the influence of law and economics generally. The reasoning and vocabulary of courts at all levels and in the context of a variety of issues indicates that, whether by way of citation or not, law and economics has penetrated contract law. Thus, returning to my original question, does scholarship matter? The answer appears to be that some of it does, but tracing this influence is not an easy matter.

96. As one would expect in all cases of appeals to authority, citation seems to be most frequently in the context of areas of law that are evolving.

97. See POSNER, *supra* note 13, at 249–53.

APPENDIX A

Guide to notations:

N = Case cites article in string cite or for matter unrelated to economic analysis of contract law

R = Economic reasoning of article discussed in opinion

I = Case appears influenced by economics found in Article

* = Cases were decided after the initial study in 1987

Expanded 1987 Study

Elliot Axelrod, *Specific Performance of Contracts for Sales of Goods: Expansion or Retrenchment in the 1980's*, 7 VT. L. REV. 249 (1982).

John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277 (1972).

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Vines v. Orchard Hills, Inc., 435 A.2d 1022, 1026 (Conn. 1980). (R).

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Robert L. Birmingham, *Legal and Moral Duty in Game Theory: Common Law Contract and Chinese Analogies*, 18 BUFF. L. REV. 99 (1969).

David W. Carroll, *Four Games and the Expectancy Theory*, 54 S. CAL. L. REV. 503 (1981).

Kenneth W. Clarkson, Roger LeRoy Miller & Timothy J. Muris, *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351.

*Willard Packaging Co. v. Javier, 899 A.2d 940 (Md. Ct. Spec. App. 2006). (N).

Wilmington Hous. Auth. v. Pan Builders, Inc., 665 F. Supp. 351, 354 (D. Del. 1987). (N).

Koenings v. Joseph Schlitz Brewing Co., 377 N.W.2d 593, 604 n.11 (Wis. 1985). (I).

Wassenaar v. Panos, 331 N.W.2d 357, 362 n.7 (Wis. 1983). (I).

Lefevere v. Sears, 629 S.W.2d 768, 771 (Tex. App. 1981). (N).

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*Akers v. RSC Equipment Rental, Inc., No. 4:09CV2022 HEA, 2010 WL 5479678, at *4 (E.D. Mo. Dec. 31, 2010). (N).

*Akers v. RSC Equipment Rental, Inc., No. 4:09CV2022 HEA, 2010 WL 2757284, at *3 (E.D. Mo. July 12, 2010). (N).

*Margiotta v. Christian Hosp. Ne. Nw., 315 S.W.3d 342, 346 (Mo. 2010). (N).

*Lynn v. Gen. Elec. Co., No. 03-2662-GTV-DJW, 2005 WL 701270, at *7 n.29 (D. Kan. 2005). (N)

*Garcia v. Kankakee Cnty. Hous. Auth., 279 F.3d 532, 536 (7th Cir. 2002). (N).

*Mackenzie v. Miller Brewing Co., 623 N.W.2d 739, 743 n.9 (Wis. 2001). (N).

*Foster v. BJC Health Sys., 121 F. Supp. 2d 1280, 1287 (E.D. Mo. 2000). (N).

*Riad v. 520 S. Mich. Ave. Assocs., 78 F. Supp. 2d 748, 755 (N.D. Ill. 1999). (N).

*Crawford-El v. Britton, 93 F.3d 813, 836 (D.C. Cir. 1996). (N).

*Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 281 (Iowa 1995). (N).

*Rowe v. Montgomery Ward & Co., 473 N.W.2d 268, 283 (Mich. 1991). (R).

*McKnight v. Gen. Motors Corp., 908 F.2d 104, 109 (7th Cir. 1990). (N).

*R.S. & V. Co. v. Atlas Van Lines, Inc., 917 F.2d 348, 352 (7th Cir. 1990). (R).

*Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 783 (9th Cir. 1990). (N).

*McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 74 (Tex. 1989). (N).

*Bullock v. Auto. Club of Mich., 444 N.W.2d 114, 132 n.2 (Mich. 1989). (R).

*Foley v. Interactive Data Corp., 765 P.2d 373, 399 (Cal. 1988). (N).

*Borowski v. DePuy, Inc., 850 F.2d 297, 301 (7th Cir. 1988). (N).

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Miller v. Int'l Harvester Co., 811 F.2d 1150, 1152 (7th Cir. 1987). (R).

Tyson v. Int'l Bhd. of Teamsters, Local 710 Pension Fund, 811 F.2d 1145, 1148 (7th Cir. 1987). (R).

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*Williams v. Patton, 821 S.W.2d 141, 147 (Tex. 1991). (R).

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*Kunelius v. Town of Stow, 588 F.3d 1, 14 n.10 (1st Cir. 2009). (N).

*Willard Packaging Co. v. Javier, 899 A.2d 940, 947 (Md. Ct. Spec. App. 2006). (R).

*Arrowhead School Dist. No. 75 v. Klyap, 79 P.3d 250, 257 (Mont. 2003). (I).

*Conagra, Inc. v. Nierenberg, 7 P.3d 369, 385 (Mont. 2000). (N).

*MetLife Capital Fin. Corp. v. Wash. Ave. Assocs., 732 A.2d 493, 498 (N.J. 1999). (N).

*DAR & Assocs. v. Uniforce Services, Inc., 37 F. Supp. 2d 192, 201 (E.D.N.Y. 1999). (I).

*Nohe v. Roblyn Dev. Corp., 686 A.2d 382, 384 (N.J. Super. Ct. App. Div. 1997). (N).

*Nat'l Emergency Servs., Inc. v. Wetherby, 456 S.E.2d 639, 641 n.2 (Ga. Ct. App. 1995). (N).

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(NOT) FREE TO LEAVE: PREVENTING TERRORISM WITH HONEST CONSENT SEARCHES

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INTRODUCTION

Suppose you were to walk down the steps into a New York City subway station carrying a large backpack. Upon entering the station, you see three uniformed police officers and a large sign declaring that "backpacks and other containers are subject to inspection." As a proud civil libertarian, you clutch your bag, stare the police officer in the eye, and look at the steps indecisively. What do you think will happen next? The Second Circuit insists that "an individual may refuse the search provided he leaves the subway."[1] Yet no one has informed you of your legal rights, so it is difficult to avoid being compelled to consent "to a search when surrounded by police at close quarters."[2] Nonetheless, this consent is considered freely given and constitutes a valid waiver of your Fourth Amendment rights.[3]

Police have an important role to play in preventing terrorist attacks on mass transit facilities. Police can set up search programs for social problems ranging from drugs in schools to terrorism, so long as the main purpose is not enforcing the criminal laws or col-

1. MacWade v. Kelly, 460 F.3d 260, 270 (2d Cir. 2006) (noting that the voluntary nature of the search indicates that the NYPD Contain Inspection Program's primary purpose is to prevent terrorists from boarding subway trains with explosives).

2. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (arguing that such consent is "absurd, meaningless, and irrelevant").

3. *See MacWade*, 460 F.3d at 270, 273 (describing the search as "voluntary" and noting that "passengers . . . may decline to be searched"); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

lecting evidence.[4] Such "special needs" searches, which can be conducted without a warrant or probable cause, are important tools wielded by law enforcement when protecting populations from terrorism.[5]

It is well established that countries across the world face a grave threat from terrorist attacks on transportation and infrastructure.[6] Leading counterterrorism experts agree that search programs are effective law enforcement tools for preventing such attacks. These experts argue that a system of checkpoints "incrementally increases security and that taken together, the [search] programs . . . [have] made it more difficult for terrorists to operate."[7] Specifically, the "flexible and shifting deployment of checkpoints deters a terrorist attack because it introduces the variable of an unplanned checkpoint inspection," which in turn "creates an incentive for terrorists to choose . . . an easier target."[8] Thus special needs searches represent "reasonably effective" ways for police to deter terrorism,[9] and eliminating them completely is not the appropriate reform.

Although special needs search programs may be vital to preventing terrorist attacks, they are largely premised on implied

4. *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) ("Given that the School District's Policy is not in any way related to the conduct of criminal investigations, respondents do not contend that the School District requires probable cause before testing students for drug use.") (reference omitted).

5. *See MacWade*, 460 F.3d at 268, 271.

6. For instance, New York City alone has experienced three relatively recent attempts to bomb its subway system: in 1997, police uncovered a plot to bomb Brooklyn's Atlantic Avenue subway station, see *id.* at 264; in 2004, police apprehended terrorists attempting to blow up the Herald Square subway station in Midtown Manhattan, see *id.*; and in 2010, police thwarted yet another plot to bomb Manhattan subway lines, see Colin Moynihan, *New Charges in Subway Bomb Plot*, N.Y. TIMES (Aug. 6, 2010), http://www.nytimes.com/2010/08/07/nyregion/07subway.html. Globally, other major cities have experienced massive terrorist attacks on their transportation systems: in 1995, twelve people died in a terrorist attack on the Tokyo subway system, see Norimitsu Onishi, *After 8-Year Trial in Japan, Cultist is Sentenced to Death*, N.Y. TIMES (Feb. 28, 2004), http://www.nytimes.com/2004/02/28/world/after-8-year-trial-in-japan-cultist-is-sentenced-to-death.html?pagewanted=all&src=pm; in 2004, over 240 people died from terrorist attacks on commuter trains in Madrid and Moscow, see *MacWade*, 460 F.3d at 264; and in 2005, at least fifty-six people died from a series of coordinated terrorist attacks on the London subway and bus systems, see *id.* Most famously, on September 11, 2001, 2,752 people died after terrorists hijacked commercial airplanes and crashed them into the World Trade Center and Pentagon. *See Accused 9/11 plotter Khalid Sheikh Mohammed faces New York trial*, CNN (Nov. 13, 2009), http://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html.

7. *MacWade*, 460 F.3d at 267 (internal quotation marks omitted).

8. *Id.* at 266–67 (alteration in original) (internal quotation marks omitted).

9. *See id.* at 273–75.

coercion—"[t]he improper use of power or trust in a way that deprives a person of free will."[10] In subway searches, uniformed officers acting from positions of authority "request" consent, individuals watch those before them acquiesce, and the threat of arrest lurks menacingly in the background throughout.[11] Moreover, in many checkpoint searches, once an individual is selected, officers have virtually unlimited discretion to request consent for more intrusive searches, enlarging the scope of the initial consent.[12] Yet courts have considered consent when evaluating special needs searches, and treated these intrusions as voluntary, "so long as . . . the passenger has been given advance notice of his liability to such a search so that he can avoid it."[13]

Consider the following drug-testing cases. In *Skinner v. Railway Executives' Association*, the Supreme Court upheld the constitutionality of mandatory drug testing of railroad employees because the employees consented to drug testing by choosing to work for a highly regulated industry.[14] In *Vernonia School District 47J v. Acton*, the Court upheld the mandatory drug testing of student athletes because they had chosen to participate in school sports and thereby consented to be drug tested.[15] The Court later made the same argument to uphold the drug testing of participants in all student activities.[16] Even outside the drug-testing context, the Court upheld border checkpoint searches, in part because travelers were able to obtain advance notice of the checkpoint's location,[17] and, therefore, implied their consent to search by approaching the checkpoint. Conversely, the Court struck down a drug-testing program for pregnant women, in part because the women were not informed they were to be drug tested and, therefore, never had the

10. BLACK'S LAW DICTIONARY 294, 1666 (9th ed. 2009).

11. *Cf. MacWade*, 460 F.3d at 264–65 (describing the subway checkpoint procedure).

12. *Cf.* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 464–65 (1990) (Stevens, J., dissenting) (noting the "virtually unlimited discretion" of officer to detain driver on the "slightest suspicion" of intoxication).

13. *MacWade*, 460 F.3d at 275 (alteration in original) (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)) (internal quotation marks omitted) (supporting the notion that voluntariness minimizes intrusiveness).

14. *See* 489 U.S. 602, 624–25 (1989).

15. *See* 515 U.S. 646, 657, 664–65 (1995).

16. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 831–32 (2002) (noting that students participating in "competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes").

17. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

opportunity to consent.[18] Yet the Court has also upheld special needs searches that lacked notice,[19] indicating that notice—and therefore consent—is not a constitutionally required element of special needs searches.

If courts were honest about the coercive nature of requests for consent in special needs searches, then the search programs would be unconstitutional. Yet, for all of the reasons discussed herein, consent is a legal fiction. This Note will argue that courts should abandon consent in their reasonableness analysis of special needs searches. Although this may seem to allow coercive searches, special needs searches performed without consent are no more coercive than other searches permitted under current law, and this provides greater honesty in Fourth Amendment law. Moreover, special needs search programs, unlike ordinary police searches, require strict procedural protections—such as stopping people at a predetermined frequency to prevent the arbitrary exercise of authority[20]—expressly designed to limit police discretion.

As the law currently stands, courts do not always consider consent when analyzing special needs searches, indicating that consent is not constitutionally required.[21] Nonetheless, it is important to limit this argument to the special needs context because such searches already have sufficient political and procedural safeguards to prevent abuse. Therefore, the proposed doctrinal shift yields significant benefits while remaining limited in scope.

This Note is organized as follows. Part I demonstrates the fiction of consent in Fourth Amendment law and extends this analysis to the special needs doctrine. Part II argues that removing consent from the reasonableness analysis of special needs searches will enhance doctrinal coherence and the integrity of Fourth Amendment jurisprudence, while ensuring that police have adequate law enforcement tools to protect against terrorism. Part III defends this proposed doctrinal shift by arguing that special needs searches

18. *See* Ferguson v. City of Charleston, 532 U.S. 67, 77 (2001) (specifically distinguishing *Skinner* and *Vernonia* on this basis).

19. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 460 (1990) (Stevens, J., dissenting) (noting that the sobriety checkpoint upheld by the majority was operated at night, in an unannounced location, and was dependent upon surprise).

20. *See* MacWade v. Kelly, 460 F.3d 260, at 273 (2d Cir. 2006) ("[T]he Program is narrowly tailored to achieve its purpose [because, *inter alia*,] . . . police exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority.").

21. *Cf. Sitz*, 496 U.S. at 460 (Stevens, J., dissenting) (noting that the sobriety checkpoint upheld by the majority was dependent upon surprise).

would retain sufficient political and procedural checks to prevent abuse.

I.
THE FICTION OF CONSENT IN FOURTH AMENDMENT JURISPRUDENCE

This section analyzes the Supreme Court's consent search jurisprudence and surveys the literature that criticizes the Court's approach as "surreal,"[22] insofar as a police request for consent is likely to be taken as a "command."[23] The purpose of this section is to explain the fundamental flaws in the Court's analysis of ordinary consent-based searches and seizures in order to provide a context for understanding special needs searches. Understanding the flaws in the Court's consent jurisprudence lays the foundation for the argument in Part II that special needs searches, unlike ordinary searches, have sufficient procedural safeguards to dispense with consent as a factor in analyzing the reasonableness of special needs searches.

Subsection A begins by developing the legal standards for consent searches from Supreme Court case law. It then explains the special needs doctrine as developed by Supreme Court and circuit court decisions. Subsection B surveys the literature criticizing consent searches as coercive based upon the social psychological pressures of authority figures, power imbalances in police encounters, racial tensions, and perverse police incentives. It then extends these criticisms of consent searches by arguing that the presence or absence of consent is irrelevant to the constitutionality of special needs searches.

A. Searches and Seizures

This subsection will discuss the constitutional requirements for police searches and describe an exception to those requirements: consent searches. First, this section will cover the major Supreme Court cases on consent searches. Second, it will examine case law

22. Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 McGeorge L. Rev. 27, 27 (2008); *see also* United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting) (arguing that the Court's consent search jurisprudence had "an air of unreality"); John M. Burkoff, *Search Me?*, 39 Tex. Tech L. Rev. 1109, 1114 (2007); Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 241–42 (2001); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 Ind. L.J. 69, 89 (2007).

23. H. Richard Uviller, Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police 81 (1988).

concerning special needs searches and evaluate the role of consent in those cases.

1. Constitutional Search Requirements and Consent Search Case Law

Constitutionally, police cannot conduct a "search" or "seizure" within the meaning of the Fourth Amendment without a warrant issued by a neutral magistrate based on a showing of probable cause.[24] Although there are various exceptions to the warrant requirement,[25] none is more prevalent than consent.[26] The Supreme Court has held that consent is voluntarily given if "a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter."[27] When determining the validity of a suspect's consent, the Court has looked at factors including the suspect's age and education,[28] whether the officer used a weapon in a "threatening manner,"[29] and whether an officer informed a suspect that he may refuse consent.[30] So long as a suspect voluntarily consents to a police search or seizure—a determination that is based objectively on the totality of the circumstances—the officer is free to search the suspect without individualized suspicion.[31]

The seminal Supreme Court case concerning consent searches is *Schneckloth v. Bustamonte*, where the Court affirmed that consent constitutes a valid exception to the normal Fourth Amendment procedural requirements.[32] *Bustamonte* began as an ordinary traffic stop.[33] After discovering that the driver did not have a license, the

24. *See* U.S. CONST. amend. IV.

25. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (noting the Court has permitted warrantless entry "to prevent the imminent destruction of evidence"); Illinois v. McArthur, 531 U.S. 326, 331–33 (2001) (allowing warrantless seizure as "[i]t involves a plausible claim of specially pressing or urgent law enforcement need, *i.e.*, 'exigent circumstances'"); United States v. Santana, 427 U.S. 38, 43 (1976) ("[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place."); Maryland Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967) (creating the "hot pursuit" exception to the warrant requirement).

26. *See* Simmons, *supra* note 2, at 773 ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.").

27. Florida v. Bostick, 501 U.S. 429, 438 (1991).

28. *See* United States v. Mendenhall, 446 U.S 544, 558 (1980).

29. *See Bostick*, 501 U.S. at 432.

30. *See id.*

31. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

32. *See id.* at 219 ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

33. *See id.* at 220.

officer requested one passenger's consent to search the car.[34] That passenger then not only gave consent, but "actually helped in the search of the car, by opening the trunk and glove compartment."[35] The search revealed stolen checks, which were used to convict a second passenger for possessing a check with intent to defraud.[36] The Court held that the officer's actions did not violate the Fourth Amendment because he obtained consent to search the car; therefore, the stolen checks were admissible evidence.[37] However, the Court went on to require that such consent must be voluntary, where "[v]oluntariness is a question of fact to be determined from all the circumstances."[38] While such a test may appear objective, the Court explained that subjective factors such as education, intelligence, and whether the police gave effective warning are relevant for deciding the voluntariness of consent.[39] The Court later extended this list to include age as well.[40]

The voluntariness test for consent searches is based largely on the unique facts of *Bustamonte*, where the officer obtained enthusiastic consent.[41] Nonetheless, the Court warned against consent obtained by explicit or implicit coercion, for "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."[42] Despite the Court's warning, critics complain that in practice, police may request consent based only on a hunch, in order to practice search techniques they learned in training, or even because of the purported suspect's race.[43] By one estimate, "[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."[44]

34. *Id.*

35. *Id.*

36. *Id.* at 219–20.

37. *See id.* at 221, 248–49.

38. *Id.* at 248–49.

39. *See id.* at 248.

40. *See* United States v. Mendenhall, 446 U.S 544, 558 (1980) (finding that race, age, and education are relevant to determining whether a suspect felt free to leave a police encounter).

41. *See Bustamonte*, 412 U.S. at 248–249 (noting the narrow and factual nature of the holding).

42. *Id.* at 228.

43. *See* Maclin, *supra* note 22, at 27.

44. Simmons, *supra* note 2, at 773.

2. Special Needs Searches

Unlike ordinary searches, the special needs doctrine applies "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . [such that] a court [is] entitled to substitute its balancing of interests for that of the Framers."[45] Courts apply the special needs exception to the warrant requirement when the purpose of the search program is "distinct from the ordinary evidence gathering associated with crime investigation."[46] Such a search is deemed reasonable only if government interests outweigh the privacy interests at stake.[47] Courts often rely on consent as an important factor in this interest-balancing reasonableness analysis.[48]

One of the earliest usages of the special needs doctrine is found in disputes regarding counterterrorism measures.[49] In *United States v. Edwards*, the Second Circuit considered the constitutionality of employing metal detector and hand searches of carry-on luggage at airports under the Fourth Amendment.[50] The court reasoned that since the purpose of the program was not to serve "as a general means for enforcing the criminal laws," but rather to prevent airplane hijacking by terrorists, it could balance "the need for a search against the offensiveness of the intrusion" rather than require the traditional warrant and probable cause requirements.[51] The Supreme Court soon extended this reasoning to warrantless searches at fixed checkpoints near the Mexican border.[52] These cases helped to establish the idea that there are circumstances "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[53]

45. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

46. MacWade v. Kelly, 460 F.3d 260, 268 (2d Cir. 2006) (quoting Nicholas v. Goord, 430 F.3d 652, 663 (2d Cir. 2005)) (internal quotation marks omitted).

47. *Id.* at 269.

48. *See, e.g.*, *id.* at 273 (holding search program to be minimally intrusive in part because passengers had opportunity to leave subway and thus decline search, and citing a number of other cases for similar propositions).

49. *See* United States v. Edwards, 498 F.2d 496, 499–501 (2d Cir. 1974).

50. *See id.*

51. *Id.* at 500.

52. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556–559 (1976).

53. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

To fall within the special needs exception to the warrant requirement, the purpose of the search must be distinguishable from ordinary, general crime control.[54] Based in part on this primary purpose test, the Court has upheld a variety of warrantless searches, including searches of the property of students in public schools,[55] drug tests of students participating in sports and other extracurricular activities at public schools,[56] drug tests of government employees,[57] drug tests of railroad personnel,[58] searches of probationers' homes,[59] and a checkpoint to obtain information about a recent hit-and-run incident.[60] The Justice Department has also argued that foreign intelligence gathering falls within the special needs doctrine.[61]

Once a special needs program satisfies the primary purpose test, courts must then analyze the reasonableness of the program. Courts typically balance four factors in assessing the reasonableness of a special needs search program: "(1) the weight and immediacy of the government interest; (2) the nature of the privacy interest allegedly compromised by the search; (3) the character of the intrusion imposed by the search; and (4) the efficacy of the search in advancing the government interest."[62] Importantly for this Note, courts often consider consent and the voluntariness of a search when analyzing its intrusiveness to determine whether it is narrowly

54. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001) (finding that the primary purpose of drug testing pregnant women and arresting those who test positive was law enforcement, so the program did not fall within the special needs doctrine); City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) (finding that a narcotics checkpoint was intended for general crime control and thus did not fall within the special needs exception to the warrant requirement).

55. *See* New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985).

56. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002); *Vernonia*, 515 U.S. at 653, 664–65.

57. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989).

58. *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989).

59. *See* Griffin v. Wisconsin, 483 U.S. 868, 876–77 (1987).

60. *See* Illinois v. Lidster, 540 U.S. 419, 427 (2004).

61. *See* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 38 (2006), *available at* http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf.

> Foreign intelligence collection, especially in the midst of an armed conflict in which the adversary has already launched catastrophic attacks within the United States, fits squarely within the area of "special needs, beyond the normal need for law enforcement" where the Fourth Amendment's touchstone of reasonableness can be satisfied without resort to a warrant.

62. MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citations omitted) (quoting Bd. of Educ. v. Earls, 536 U.S. 822, 830, 832, 834 (2002)) (internal quotation marks omitted).

tailored to the government interest. For instance, the Second Circuit upheld the constitutionality of New York City's subway search program, in part because "passengers receive notice of the searches and may decline to be searched so long as they leave the subway."[63] Similarly, the Supreme Court upheld the constitutionality of border checkpoints, in part because drivers were able to obtain adequate notice of checkpoint locations with an opportunity to avoid them if the drivers did not wish to be searched.[64]

B. Criticism of Consent

This Subsection criticizes consent searches on the ground that they are based more upon intimidation than consent. It begins by analyzing recent Supreme Court cases and continues by examining law review articles and social psychology literature on the subject of consent. It then applies these criticisms of consent to special needs searches.

1. Flaws in the Supreme Court's Consent Search Jurisprudence

Cases after *Bustamonte* reveal a flaw in the Court's consent search jurisprudence, namely that police can take advantage of positions of power when they request citizens' consent. In *Ohio v. Robinette*, the Court upheld the voluntariness of a consent search where consent was given immediately after a traffic stop, despite the fact that the officer did not inform the suspect that the stop had ended.[65] The Court reasoned that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[66] In *Whren v. United States*, decided the prior Term, the Court unanimously upheld pretextual police stops based upon probable cause.[67] When *Whren* and *Robinette* are examined together, it is clear that the Court is permitting police to stop motorists based upon minor traffic violations[68] and then, while the motorists are feeling vulnerable, ask for consent to search. For example, an officer who wants to search a drug suspect can stop him for an unrelated reason, such as failure to signal before turning, and can then try to obtain his consent to

63. *Id.* at 273 (collecting cases).

64. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

65. 519 U.S. 33, 39–40 (1996).

66. *Id.* at 40.

67. 517 U.S. 806, 812–13, 817–19 (1996).

68. The defendant in *Whren* was stopped for waiting "at the intersection for what seemed an unusually long time—more than 20 seconds." *Id.* at 808.

search the car.[69] Only Justice Ginsburg recognized that "traffic stops . . . were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity."[70]

Despite Justice Ginsburg's warning, the Court has continued to encourage police use of consent searches.[71] In *Florida v. Bostick*, two uniformed officers with visible gun pouches boarded a bus during a stopover to search for drugs.[72] During the drug interdiction, the officers obtained Bostick's consent to search his luggage, which yielded contraband.[73] Bostick argued that he did not freely consent to the search since he was seated with little ability to move, during a stopover in a city that was not his destination, while a uniformed police officer towered over him.[74] The Court responded that "Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus"[75] and then went on to state that "the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him."[76] Bostick next argued that no reasonable person would consent to a search that he knew would yield drugs, so the consent could not have been voluntary.[77] Yet the Court replied that "the 'reasonable

69. *See id.* at 813 (noting that precedent "foreclose[s] any argument that the constitutional reasonableness of [a] traffic stop[ ] depends on the actual motivations of the individual officers involved").

70. *Robinette*, 519 U.S. at 40 (Ginsburg, J., concurring).

71. *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 210–11 (arguing that the *United States v. Drayton* majority believed "that consent searches ought to be encouraged (or at least not discouraged) because they reinforce the rule of law"); *see also* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 5 (4th ed. 2004) (stating, with reference to the Supreme Court, that "[t]he practice of making searches by consent is not a disfavored one").

72. 501 U.S. 429, 431–32 (1991).

73. *See id.* at 432.

74. *See id.* at 435.

75. *See id.* at 436.

76. *Id.* at 436.

77. *See id.* at 437–38; *cf.* Burkoff, *supra* note 22, at 1114 ("How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to *really* consent—'freely and voluntarily'—to being searched by a police officer, knowing full well that such a search would result inevitably in the discovery of the cocaine and a subsequent arrest?"); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 128 (1999) ("It is inherently improbable that criminal suspects voluntarily would consent to the discovery of the very evidence necessary to seal their legal demise.").

person' test presupposes an *innocent* person."[78] It then went on to give the imprimatur of law to de facto police coercion, declaring that "this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful."[79]

More recently in *United States v. Drayton*, which had very similar facts,[80] the Court reiterated many of these arguments.[81] The Court in *Drayton* explicitly upheld consent searches by three police officers of two defendants with felony-weight narcotics hidden on their persons as "voluntary."[82] *Drayton* is especially striking since one of the defendants "consented" after his co-defendant had already been searched and found to possess drugs.[83]

Unsurprisingly, both cases provoked strong dissents. Justice Marshall, dissenting in *Bostick*, noted that the defendant's only choices were to consent to the search, "obstinately" refuse to answer the officer's questions, which would be suspicious in itself, or get off the bus in an unfamiliar city without his luggage.[84] Marshall went on to argue that it would be unreasonable for the defendant to even attempt to leave since the "gun-wielding" officer was "blocking the aisle."[85] He concluded that "[i]t is exactly because this 'choice'

78. *Bostick,* 501 U.S. at 438 (emphasis in original).

79. *Id.* at 439.

80. 536 U.S. 194 (2002). In *Drayton*, both defendants were on a Greyhound bus from Ft. Lauderdale, Florida to Detroit, Michigan that stopped in Tallahassee, Florida. *Id.* at 197. During the stop, three officers boarded the bus for a drug interdiction and asked passengers for consent to search their person and luggage. *See id.* at 197–99. Although passengers could refuse to consent and exit the bus, the officer did not inform the passengers of this right. *Id.* at 198. During the interdiction, one defendant consented to a search of his person that yielded cocaine. *Id.* at 199. Immediately afterwards, the other defendant consented to a search of his person which also yielded cocaine. *Id.* at 199. The District Court found the consent to be voluntary, noting that the officers were in plainclothes, did not brandish their weapons, did not raise their voices, and did not block the aisle. *Id.* at 200.

81. Citing *Bostick*, 501 U.S. at 436, the *Drayton* Court argued that although the suspects' movements were confined and they did not wish to leave the bus in a location that was not their destination, "this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive." 536 U.S. at 201–02. The *Drayton* Court also reaffirmed the holding from *Bostick* that the "reasonable person test . . . is objective and presupposes an *innocent* person" to reject the argument that the suspect "must have been seized because no reasonable person would consent to a search of luggage containing drugs." *Id.* at 202 (quoting *Bostick*, 501 U.S. at 437–38) (internal quotations omitted).

82. *See Drayton,* 536 U.S. at 207–08.

83. *See id.* at 199.

84. *See Bostick*, 501 U.S. 447–48 (Marshall, J., dissenting).

85. *See id.* at 448

is no 'choice' at all that police engage in this technique."[86] Yet while Marshall merely accused the majority of "sophism,"[87] Justice Souter struck a much harsher tone in his dissent from *Drayton*, finding "an air of unreality" in the majority's application of the consent search doctrine.[88] The Court has at times acknowledged that "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest."[89] Nonetheless, *Bustamonte*, *Robinette*, *Whren*, *Bostick*, and *Drayton* remain good law.

2. Scholarly Criticism of Consent Search Case Law

Although the literature criticizing consent searches is extensive, it generally makes four interrelated arguments. First, the social dynamic of police encounters creates strong psychological pressure for citizens to comply with officers.[90] Outside observers, such as judges, tend to miss these important social factors causing them to overestimate the voluntariness of the consent.[91] Second, the authority of officers creates a power imbalance that coerces citizens into consenting to searches.[92] Third, race exacerbates the two aforementioned issues, particularly when a white officer requests consent to search from a non-white suspect.[93] Fourth, consent searches create perverse incentives for officers since they benefit from finding contraband but face few, if any, repercussions for unnecessary or abusive consent searches.[94] Many of these factors have been documented by extensive empirical research.[95]

a. Social Psychology Research: Consent Relies on Mistaken Assumptions About Human Nature

Decades of social psychology research have confirmed that the likelihood that an individual will comply with requests made by others is deeply affected by two factors: authority and social valida-

86. *Id.* at 450.

87. *Id.*

88. *Drayton*, 536 U.S. at 208 (Souter, J., dissenting).

89. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971). The Court went on to create a judicial remedy for abuses of federal law enforcement power in the form of monetary damages. *See id.* at 397.

90. *See, e.g.*, Nadler, *supra* note 71, at 155; Simmons, *supra* note 2, at 807, 809.

91. *See, e.g.*, Nadler, *supra* note 71, at 155–56.

92. *See, e.g.*, Lassiter, *supra* note 77, at 129–31.

93. *See, e.g.*, *id.* at 128–31.

94. *See, e.g.*, Maclin, *supra* note 22, at 31–32.

95. *See, e.g.*, Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

tion.[96] It is widely accepted that people will obey requests from legitimate authorities.[97] For example, Stanley Milgram, in the guise of conducting an experiment on education, famously had his experimenters ask research participants to act as "teachers" by administering what they believed to be painful electric shocks to other participants acting as "learners."[98] In reality, there were no shocks and the "learners" were actually confederates of the experimenter, but this was not known to the "teachers."[99] Despite eliciting verbal protests and painful screams, in one version of the experiment over 65% of participants obeyed the experimenters and turned the shock dial up to "danger: severe shock" and even "XXX."[100] All of the participants continued to administer what they thought were electric shocks even after the subject protested that he was in pain.[101] Other psychologists have observed that people will continue to obey authority figures irrespective of the command's prudence[102] and that obedience to authority is sometimes viewed as a useful social strategy.[103]

Unsurprisingly, the Milgram experiments inspired a large body of literature criticizing consent searches.[104] Further psychological

96. *See id.* at 173.

97. *See, e.g.*, *id.* at 173–74.

98. *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 19 (1974).

99. *See id.* at 24.

100. *See id.* at 35 tbl.2.

101. *See id.* at 23, 35 tbl.2.

102. *See* EDWARD E. JONES, INTERPERSONAL PERCEPTION 124 (1990) (remarking that social roles, such as authority-subordinate roles, are so ingrained that we comply with authorities' requests more or less automatically); ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 9–10 (4th ed. 2001) (noting that airline crew members regularly obey their captain, permitting errors to go uncorrected); H. Clayton Foushee, *Dyads and Triads at 35,000 Feet: Factors Affecting Group Process and Aircrew Performance*, 39 AM. PSYCHOLOGIST. 885, 888 (1984) (observing that a captain's dominance in the cockpit can condition crewmembers not to disagree with the captain's decisions).

103. *See* Robert B. Cialdini & Melanie R. Trost, *Social Influence: Social Norms, Conformity and Compliance*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 170 (Daniel T. Gilbert et al. eds., 4th ed. 1998) ("[C]onforming to the dictates of authority figures produces genuine practical advantages.").

104. *See, e.g.*, Illya Lichtenberg, Miranda *in Ohio: The Effects of* Robinette *on the "Voluntary" Waiver of Fourth Amendment Rights,* 44 HOW. L.J. 349, 364–65 (2001) (arguing that some of Milgram's experiments support the contention that subjects who consent to searches are responding to coercive "social power" of the authority, not "legitimate power" which is supported by legal authority); Nadler, *supra* note 71, at 176–77 (conceding that there are "obvious differences" between Milgram's studies and consensual searches during bus sweeps, but concluding that the experiments support the theory that authority leads to coercion since in each case "people are coerced to comply when they would prefer to refuse" due to the "symbols

studies indicated that compliance rates increase by 36% to 56%, depending on the task involved, when the requester is wearing a uniform.[105] When the psychological power of legitimate authority and a uniform are combined in, say, a routine traffic stop, individuals will "automatically comply" with police requests.[106] In fact, another study revealed that over 90% of citizens stopped for traffic violations on Ohio interstates consented to a search.[107] A study participant explained, "I knew legally I didn't have to [consent], but I kind of felt like I had to."[108] Such research belies the notion expressed by the *Bustamonte* Court that consent to search a car during a traffic stop is voluntary.[109]

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of authority" that are present); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches,* 69 WASH. U. L.Q. 175, 188–89 (1991) (acknowledging that it is "risky" to apply Milgram's experiment to consent searches, but nevertheless concluding that Milgram demonstrates that "police authority" is the main reason that individuals consent to searches); Strauss, *supra* note 22, at 239 (using Milgram's experiments as evidence that individuals are likely to obey a "request" made by authorities even if they are likely to be harmed by complying); Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte: *Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent,* 1997 U. ILL. L. REV. 215, 241, 243 (1997) (arguing that Milgram's experiments demonstrate that individuals obey legitimate authority "to an astonishing degree," thus challenging *Bustamonte*'s premise that psychological coercion is only significant in a custodial context); Dennis J. Callahan, Note, *The Long Distance Remand:* Florida v. Bostick *and the Re-Awakened Bus Search Battlefront in the War on Drugs,* 43 WM. & MARY L. REV. 365, 414–15 (2001) (using the Milgram experiments as evidence that individuals have difficulty defying authority in the context of a bus search, and proposing a *Miranda*-like warning to reduce the coercive effects); Jeremy R. Jehangiri, Student Article, United States v. Drayton: *"Attention Passengers, All Carry-On Baggage and Constitutional Protections Are Checked in the Terminal,"* 48 S.D. L. REV. 104, 126–27 (2003) (using Milgram's experiments as evidence of the "coercive effects" of suspicionless bus searches).

105. *See* Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 49–51 & tbl.1 (1974) (finding much higher compliance rates for requests by security guards than for milkmen or civilians); Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501, 506 (1984) (finding an 82% compliance rate for requests by a fireman in comparison to 50% compliance for requests by business executives); *see also* Barrio, *supra* note 104, at 240 (concluding that the security guard uniform in the Bickman study created an "almost hypnotic power" over the experiment's subjects).

106. Strauss, *supra* note 22, at 240, 242; *see also* Simmons, *supra* note 2, at 809 ("When combined with the Milgram experiments, the Bickman study completes a persuasive combination of psychological evidence that the current rules of consent are misguided.").

107. *See* Nadler, *supra* note 71, at 202 & n.160 (summarizing research by Illya D. Lichtenberg).

108. *Id.* at 202.

109. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

While psychological research on obedience to authority can partly explain the otherwise puzzling phenomenon of guilty suspects consenting to police searches, social validation plays an important role as well. In new or ambiguous situations, individuals often engage in "social learning" wherein they decide the correctness of their actions by following others' actions.[110] This cognitive strategy has been observed in pedestrians deciding whether to look upwards at a building[111] and bar patrons deciding whether to tip the bartender.[112] The research generally demonstrates that "[p]eople are especially likely to comply with a request when it appears that other people like themselves have already done so."[113] In an especially chilling demonstration of this phenomenon, over 900 people calmly committed mass suicide in Jonestown, Guyana in 1978 after one young woman volunteered to drink a cyanide-laced drink.[114]

Despite these widely acknowledged and deeply researched concepts of social psychology, the Court continues to insist that consent given to police officers "should be given a weight and dignity of its own" that "dispels inferences of coercion."[115] This seeming disconnect can be explained by yet another psychological concept: actor-observer bias. Although individuals are generally able to recognize situational forces that affect their own behavior, there is a "vast scientific literature" establishing that people are strongly inclined to explain others' behavior in terms of internal causes while ignoring situational factors.[116] This could be because the situational factors are "invisible" to the observer, and therefore not credited,[117] or because the observer simply cannot imagine herself in the actor's shoes.[118] For example, in one experiment participants perceived a videotaped confession as more voluntary when viewed from the interrogator's perspective and less voluntary when viewed from the defendant's perspective.[119] This observational cognitive

110. *See* Cialdini & Trost, *supra* note 103, at 155.

111. *See* Stanley Milgram et al., *Note on the Drawing Power of Crowds of Different Size*, 31 J. PERSONALITY & SOC. PSYCHOL. 79, 79–81 (1969).

112. *See* Nadler, *supra* note 71, at 180.

113. *Id.*

114. *See* CIALDINI, *supra* note 102, at 130–32.

115. United States v. Drayton, 536 U.S. 194, 207 (2002).

116. Nadler, *supra* note 71, 168–69.

117. *See* Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 25 (1995).

118. *See, e.g.*, G. Daniel Lassiter et al., *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 189, 208 (2001).

119. *See id.*

bias may explain why the Court has had such difficulty recognizing that the consent of defendants in cases like *Robinette*, *Bostick*, and *Drayton* was less than voluntary.[120]

b. Legal Scholarship: Consent Ignores Power Imbalances

While understanding the complex psychological pressures present in police interactions may require scientific studies, much of the implicit coercion in police search requests is more mundane. Throughout any encounter with the police lies the unspoken knowledge that the officer can arrest the suspect and even charge him with obstruction of justice for refusing to cooperate.[121] If a citizen refuses to consent to a search, the officer may exert her coercive power, whether implied or explicit, to achieve compliance.[122] Thus the officer's ability to use coercion, despite the legal constraints of the Fourth Amendment, creates an "asymmetrical power relationship in the police-citizen encounter."[123] This "inherent imbalance of power in police confrontations" causes citizens to trade cooperation[124] for the avoidance of potential "unpleasant, though unknown, consequences."[125]

The Ohio highway study discussed above provides empirical support for this interpretation of consent searches.[126] Of the more than 90% of participants who consented to be searched, over 95% said that they were afraid of what would happen to them if they did not consent.[127] Such fears included having their trip unduly delayed, being searched anyway, incurring damage to their car, being arrested, being beaten, or even being killed.[128] Moreover, nearly all the respondents thought that the police would not have honored their refusal.[129] It seems that they were right, since two participants reported being searched despite their explicit refusal

120. *See* Nadler, *supra* note 71, at 171–72.

121. *See, e.g.*, Lassiter, *supra* note 77, at 81.

122. *See* Nadler, *supra* note 71, at 201-03 (summarizing research by Illya D. Lichtenberg).

123. *Id.*

124. Lassiter, *supra* note 77, at 81.

125. UVILLER, *supra* note 23, at 81.

126. *See* Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

127. *See id.*

128. *See id.*

129. *See id.*

to consent.[130] It is difficult to find a clearer rebuttal to the Court's idea that consent "dispels inferences of coercion."[131]

c. Racial Disparities Exacerbate the Power Imbalance

Many commentators have noted that these inherently coercive effects are exacerbated by racial difference. For instance, Tracey Maclin argues that "for most black men, the typical police confrontation is not a consensual encounter."[132] There are two main reasons for this. First, based on prior experience with police, a black suspect may have a lower "comfort level" in distinguishing between police commands and discretionary requests.[133] Second, black defendants often have fewer resources, leaving them at a disadvantage in the legal process.[134] These factors are often both in play in routine traffic stops. Indeed, much has been written on "driving while black."[135] In the 1990's, John Lamberth definitively showed that 73.2% of those stopped and arrested on the New Jersey Turnpike were black, while only 13.5% of the cars on the road had a black driver or passenger.[136] Moreover, blacks comprised 35% of those stopped, 19.45 standard deviations greater than the expected rate given the low frequency of blacks on the road.[137] These "statistically vast" disparities led Lamberth to conclude that police engaged in a

130. *See id.*

131. United States v. Drayton, 536 U.S. 194, 207 (2002).

132. Tracey Maclin, "*Black and Blue Encounters" — Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 272 (1991).

133. Lassiter, *supra* note 77, at 81.

134. *See id.* at 81–82.

135. *See, e.g.*, *id.* at 115–24; David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,* 87 J. CRIM. L. & CRIMINOLOGY 544, 546 n.10 (1997) (describing the Washington, D.C. origins of the phrase); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 [hereinafter Harris, *The Stories*] (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards,* 28 COLUM. HUM. RTS. L. REV. 551 (1997) (discussing "D.W.B.: Driving While Black"); Jennifer A. Larrabee, Note, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice,* 6 J. L. & POL'Y 291 (1997); Harriet Barovick & Elizabeth Rudolph, *DWB: Driving While Black,* TIME, Jun. 15, 1998, at 35; Henry Louis Gates, *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, 59, *available at* http://www.newyorker.com/archive/1995/10/23/1995_10_23_056_TNY_CARDS_000372419?currentPage=all; Tracey Maclin, *Can a Traffic Offense Be: D.W.B. (Driving While Black)?,* L.A. TIMES (Mar. 9, 1997), http://articles.latimes.com/1997-03-09/opinion/op-36359_1_traffic-stop.

136. *See* Harris, *The Stories*, *supra* note 135, at 279 (discussing Dr. Lamberth's research).

137. *Id.*

"discriminatory policy, official or de facto, of targeting blacks for stop and investigation."[138]

These racial disparities become especially important in consent searches, which some argue are the "handmaiden[s] of racial profiling."[139] Consent searches, which do not require individualized suspicion, are "more likely to be directed at poor young black men than wealthy white elderly women."[140] Although the Court has taken race into account when assessing whether a suspect felt free to leave a police encounter,[141] courts do not generally accept that a racial power imbalance vitiates the voluntariness of consent.[142]

After the terrorist attacks of September 11, 2001, much of the racial profiling debate has shifted towards Middle Eastern men.[143] Shortly after the attacks, the Justice Department developed a list of approximately 5,000 young aliens from Middle Eastern nations between the ages of eighteen and thirty-three to be questioned by local police regarding their knowledge of terrorism "on a consensual basis."[144] However, a leaked memo later "suggested that the interviews were a potential vehicle to identify immigration violators . . . [who] would be detained and held without bond."[145] While it is unclear whether this program constitutes racial profiling, Samuel Gross and Debra Livingston argue that "the Justice Department's program *would* involve ethnic profiling if it was undertaken even in part based upon a general belief that Middle Eastern men are more likely to commit acts of terrorism than people of other ethnic groups—if it was based upon a global assumption about the criminal propensities of people of Middle Eastern descent."[146] To the extent that Middle Eastern men feel that "the government is sup-

138. *Id.* (internal quotation marks omitted).

139. George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 542 (2003).

140. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 31 (1999).

141. *See* United States v. Mendenhall, 446 U.S 544, 558 (1980) (noting that defendant's race and gender were "not irrelevant" when establishing whether she voluntarily consented to a seizure).

142. *See* Lassiter, *supra* note 77, at 128–31.

143. *See* Tracey Maclin, *"Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror*, 73 MISS. L.J. 471, 472–73 (2003) (noting the changed attitudes of the public and public figures regarding racial profiling of Middle Eastern men due to the September 11 attacks).

144. *Id.* at 479–81 (internal quotations omitted).

145. *Id.* at 482–83.

146. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1421 (2002).

porting suspicion based on background, not behavior,"[147] they will experience a lower comfort level with law enforcement.[148] As a result, many Middle Easterners may feel "powerless to reject the government's request for a 'voluntary' interview."[149]

d. The Consent Doctrine Skews Police Incentives

While most of the academic criticism of the consent search doctrine focuses on the suspects, it is important to recognize the effects of the doctrine on police as well. Consent searches have become "a dominant—perhaps *the* dominant—type of lawful warrantless search,"[150] potentially because it is much easier for police to obtain consent than to get a search warrant.[151] "In the routine case, police are likely to rely on the consent search to save the time and avoid the difficulty involved in going though the rather elaborate procedure required to obtain a search warrant."[152] Moreover, "[i]f police are routinely rewarded with consent, they have little incentive to develop individualized probable cause"[153] since "[i]n most jurisdictions, a request for consent need not be based upon any suspicion of criminal conduct."[154] Finally, so long as "the consenting party does not carefully condition or qualify his consent . . . the search pursuant to consent may often be of a somewhat broader scope than would be possible under a search warrant."[155] In short,

147. Jodi Wilgoren, *A Nation Challenged: The Interviews; Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain*, N.Y. TIMES (Nov. 15, 2001), http://www.nytimes.com/2001/11/15/us/nation-challenged-interviews-prosecutors-begin-effort-interview-5000-but-basic.html?pagewanted=all (reporting reactions to Department of Justice's questioning of 5,000 Middle Eastern men).

148. *Cf.* Lassiter, *supra* note 77, at 81, 129 (arguing that negative prior experiences with and targeting by law enforcement can cause black suspects to experience "a lower comfort level" in interpreting official requests for consent as anything but demands).

149. Maclin, *supra* note 143, at 478.

150. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 16.01, at 261 (4th ed. 2006). Warrantless searches are also permissible based on various types of exigency. *See supra* note 25.

151. *See, e.g.*, RICHARD VAN DUIZEND, ET AL., THE SEARCH WARRANT PROCESS 68–69 (1985) ("[L]istening to some law enforcement officers would lead to the conclusion that consent is the easiest thing in the world to obtain.").

152. LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 159 (1967); *see also* Strauss, *supra* note 22, at 259 ("[E]ven if the police have probable cause to search, and even if procuring a warrant would not be onerous, an officer may elect to obtain consent because it increases the likelihood that the search would be deemed valid.").

153. Thomas, *supra* note 139, at 542.

154. Maclin, *supra* note 22, at 31.

155. 4 LAFAVE, *supra* note 71, § 8.1, at 5.

police are incentivized to use consent searches since they circumvent the Fourth Amendment's procedural limitations.

3. Flaws in Consent in the Special Needs Doctrine

As in the case of ordinary searches and seizures, consent is a crucial element of special needs search programs. This subsection will criticize as unrealistic courts' reliance on consent as a factor for determining the reasonableness of a special needs program. Further, it will argue that the procedural safeguards built into special needs searches make consent unnecessary as a check on reasonableness in this context.

Using police requests for consent to search as part of a special needs program suffers from two flaws. First, doing so is doctrinally incoherent since courts at times place great emphasis on the supposed voluntariness of the search[156] but at other times ignore it completely.[157] Since courts have upheld special needs programs both with and without consent, consent cannot be relevant to the constitutionality of special needs searches. Second, consent searches in special needs programs are just as psychologically coercive as all other consent searches.[158] However, if the special needs program sufficiently limits police discretion, it may prevent police from abusing consent searches or using them based on race.[159]

a. Doctrinal Incoherence

Supreme Court cases evaluating the reasonableness of programmatic searches express extraordinary ambivalence about the role of consent. Justice Kennedy has noted that "[a]n essential, distinguishing feature of the special needs cases is that the person searched has consented."[160] Yet the Court has also upheld a special needs search program premised on surprise, where the individual

156. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 207 (2002); 4 LAFAVE, *supra* note 71, § 8.1, at 5.

157. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 463–64 (1990) (Stevens, J., dissenting) (noting that the Court upheld sobriety checkpoints despite a lack of notice).

158. *See supra* Part I.B.2.a.

159. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006) ("[P]olice exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority . . . .").

160. Ferguson v. City of Charleston, 532 U.S. 67, 90 (2001) (Kennedy, J., concurring).

had no opportunity to avoid the search.[161] The Court's schizophrenic approach to consent in special needs searches demonstrates the irrelevance of consent to the underlying doctrine.

In *United States v. Martinez-Fuerte*, the Court considered it relevant that individuals are "not taken by surprise."[162] After noting that motorists saw repeated signage for a mile warning of the upcoming immigration checkpoint, the Court reasoned that motorists effectively knew, or could come to know, where they would and would not be stopped.[163] Similarly, in *Vernonia School District 47J v. Acton* and *Board of Education v. Earls*, the Court held that students consented to drug testing by choosing to play on sports teams[164] or participate in other after-school extracurricular activities.[165] The Court underscored the importance of consent in *Ferguson v. City of Charleston*, where it struck down a state hospital's drug testing program as an unreasonable search since "the hospital s[ought] . . . to conduct drug tests and to turn the results over to law enforcement . . . without the knowledge or consent of the patients."[166]

While the Court may have found consent constitutionally relevant for immigration checkpoints, it has ignored consent entirely in other checkpoint cases. In *Michigan Department of State Police v. Sitz*, the Court upheld a sobriety checkpoint that only ran after midnight, in an unannounced location, with no warning signage.[167] Given the program's design, it is impossible to contend that the motorists consented to be searched; in fact, surprise was "crucial to its method."[168] Conversely, in *City of Indianapolis v. Edmond*, the Court struck down a narcotics checkpoint program whose checkpoints were "clearly marked" by warning signs.[169] It is difficult to reconcile *Sitz* and *Edmond* with the Court's recognition that motor-

161. *See Sitz*, 496 U.S. at 463 (Stevens, J., dissenting) (criticizing the majority for upholding a sobriety checkpoint where drivers have no "advance notice of the location" or any "opportunity to avoid the search").

162. 428 U.S. 543, 559 (1976).

163. *See id.* at 545–46, 559.

164. *See* 515 U.S. 646, 657 (1995) ("[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

165. *See* 536 U.S. 822, 831–32 (2002) ("[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.").

166. 532 U.S. 67, 77 (2001).

167. 496 U.S. 444, 460 (1990) (Stevens, J., dissenting).

168. *Id.*

169. 531 U.S. 32, 52 (2000) (Rehnquist, C.J., dissenting); *see also id.* at 48 (majority opinion).

ists were "not taken by surprise" at checkpoints when upholding the *Martinez-Fuerte* program.[170]

The Court has proven equally ambivalent about consent in drug-search cases. In *Skinner v. Railway Labor Executives' Association*, the Court upheld employee drug-testing, even when the employees never actually consented.[171] The Court reasoned that since "an employee consents to significant restrictions in his freedom of movement where necessary for his employment, . . . [a]ny additional interference . . . to procure a blood, breath, or urine sample for testing" as a condition of employment is not unreasonable.[172] Such consent can hardly be deemed voluntary, making *Skinner* little different from *Ferguson*. Yet the Court upheld the workplace drug-testing program in *Skinner*, while striking the hospital program in *Ferguson*. Since the presence or absence of meaningful consent seems in practice to have little bearing on whether a special needs search program is upheld, consent cannot be relevant to the constitutionality of special needs searches.

b. Implicit Coercion

Police requests for consent in special needs searches face many of the same problems that undermine the voluntariness of the consent in standard consent searches. For instance, most special needs searches are conducted by uniformed officers acting in positions of authority.[173] As the Milgram, Bickman, and Ohio interstate studies show, individuals typically find it psychologically difficult to avoid complying with police requests in such circumstances.[174] Those stopped and asked for consent to search typically see others searched before them,[175] so they are further pressured into comply-

170. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976); *see also* Kevin E. Meehan & George M. Dery, III, *The Supreme Court's Curious Math: How a Lawful Seizure Plus a Non-Search Add Up to a Fourth Amendment Violation in* City of Indianapolis v. Edmond, 32 U. MEM. L. REV. 879, 914–20 (2002) (arguing that the Court's holding in *Edmond* is inconsistent with *Sitz* and *Martinez-Fuerte*).

171. 489 U.S. 602, 611, 634 (1989).

172. *Id.* at 624–25.

173. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (noting that "uniformed police officers stop every approaching vehicle"); *Martinez-Fuerte*, 428 U.S. at 546 (detailing searches conducted by "a Border Patrol agent in full dress uniform"); MacWade v. Kelly, 460 F.3d 460, 264 (2d Cir. 2006) ("A 'checkpoint' consists of a group of uniformed police officers standing at a folding table near a row of turnstiles disgorging onto the train platform.").

174. *See supra* Part I.B.2.a.

175. *See, e.g.*, *Sitz*, 496 U.S. at 448 ("During the 75-minute duration of the checkpoint's operation, 126 vehicles passed through the checkpoint."); *Martinez-*

ing by a need for social validation.[176] Moreover, individuals are aware that the officer requesting their consent to search can arrest them and accuse them of obstructing justice at any point in the encounter.[177] Given these reasons, it is not surprising that "hardly anyone feels free to walk away from a police officer without the officer's permission."[178]

The Court's schizophrenia with respect to consent in special needs searches can perhaps be explained by its inability to acknowledge these implicitly coercive factors. Judges, like everyone else, tend to attribute others' behavior to internal motivations rather than situational factors.[179] This actor-observer cognitive bias helps explain why the Court is of two minds about consent in special needs searches. However, there is a silver lining to the special needs doctrine. Unlike standard consent searches, which operate virtually free of legal requirements,[180] special needs searches require strict procedural safeguards to compensate for their lack of individualized suspicion.[181] By eliminating police discretion over whom to stop, special needs programs significantly reduce the ability of police officers to abuse consent searches, particularly those based on race.[182] Nonetheless, some police discretion often remains regarding secondary screening.[183] For example, in *Martinez-Fuerte*, Border Patrol officers had "wide discretion in selecting the motorists to be diverted,"[184] perhaps allowing some degree of abuse to continue.[185]

Fuerte, 428 U.S. at 546 ("[T]he checkpoint brings [traffic] to a virtual, if not complete, halt.").

176. *See supra* Part I.B.2.a.

177. *See supra* Part I.B.2.b.

178. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2170 n.102 (2002).

179. *See supra* Part I.B.2.a.

180. *See supra* Part I.B.2.d.

181. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 452 (1990) (finding checkpoint constitutionally indistinguishable from upheld program because "[h]ere, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle"); United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (noting that checkpoint operations involve little "discretionary enforcement activity"); MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006) ("[P]olice exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority.").

182. *See supra* Part I.B.2.c.

183. *See Sitz*, 496 U.S. at 464–65 ("A Michigan officer who questions a motorists at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion.") (Stevens, J., dissenting).

184. *Martinez-Fuerte*, 428 U.S. at 563–64.

II.
REEXAMINING POLICE CONSENT SEARCHES

In response to the implicit coercion in police requests to search, some commentators have proposed a *Miranda*-like warning advising citizens of their right to refuse a request to search,[186] while others find a warning inadequate,[187] and a few even propose eliminating consent searches altogether.[188] Consent should be eliminated as a factor in the reasonableness analysis of special needs searches but not ordinary searches and seizures. Special needs searches are already tightly regulated by the courts, which require strict procedural protections to prevent police abuse. Moreover, since consent to police searches is already implicitly coerced, abandoning consent in special needs searches entails little, if any, loss of liberty. However, the Fourth Amendment must still protect against unreasonable police searches and seizures. Therefore, although it may be a myth that consent to police searches can ever truly be freely given, consent should remain a factor in the analysis of ordinary searches because the very notion of policing entails a license to use coercion in certain circumstances as a means of ensuring safety.

A. Abandoning Consent for Special Needs Searches

Special needs search programs are an effective means for law enforcement to protect public safety against dangers ranging from terrorism to drunk driving.[189] Yet, as discussed above, the Court cannot seem to make up its mind whether consent should affect the constitutionality of a special needs search.[190] When programmatic searches request consent, such consent can hardly be deemed voluntary in light of the psychological pressures citizens face from uniformed police officers who are requesting consent from dozens of people and can arrest citizens at any time.[191] Therefore, aban-

185. *See id.* at 563 (holding such discretion constitutional, even if "such referrals are made largely on the basis of apparent Mexican ancestry"). *But see infra* Part III.B.

186. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1030 (2002); Rebecca A. Stack, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 205–08 (1991); Carol S. Steiker, "*How Much Justice Can You Afford?*"—*A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1294 (1999).

187. *See, e.g.*, Nadler, *supra* note 71, at 204–06; Strauss, *supra* note 22, at 254.

188. *See, e.g.*, Lassiter, *supra* note 77, at 131–34.

189. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990); MacWade v. Kelly, 460 F.3d 260, 266, 273–75 (2d Cir. 2006).

190. *See supra* Part I.B.1.

191. *See supra* Part I.B.2.b–c.

doning consent in the reasonableness analysis of special needs searches succeeds in making Fourth Amendment doctrine more coherent while also bringing courts' analysis more in line with social reality. Since consent to police requests to search is already implicitly coerced,[192] this doctrinal shift entails few costs of civil liberties while bringing the significant benefit of making police search law more honest.[193]

This subsection first demonstrates how procedural protections that are constitutionally required for special needs searches protect against police abuse. It then shows how special needs searches without consent would operate in practice.

1. Political and Procedural Protections in Special Needs Searches

Special needs search programs aimed at protecting the general populace differ from individualized searches in two important ways: transparency and the number of people affected. When an individual is stopped for an ordinary search, it is a highly personal experience, and he may never even tell anyone about it.[194] Conversely, police at a checkpoint stop everyone who attempts to pass by, or at least a preset percentage of them, affecting hundreds or even thousands of people.[195] Thus special needs searches "convert searches and seizures from takings, burdening only isolated individuals, into taxes, burdening classes of people" in a very visible manner.[196] As a result, "[g]roup searches and seizures, unlike individual ones, are largely self-regulating,"[197] since police will face political pressure if they subject large numbers of citizens to harsh and intrusive tactics.[198] Importantly, for purposes of this Note, this political mechanism operates entirely independently from whether or not

192. *See supra* Part I.B.2.

193. *See infra* Part III.A–B.

194. *See* OFFICE OF ATT'Y GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 78 (1999) [hereinafter STOP & FRISK REPORT].

195. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448, 453 (1990) (noting that during a seventy-five minute period "126 vehicles passed through the checkpoint" and a "uniformed police officers stop[ped] every approaching vehicle"); MacWade v. Kelly, 460 F.3d 260, 264 (stating that the New York City subway system "carries more than 4.7 million passengers" on an average weekday, and "approximately 1.4 billion riders" per year).

196. Stuntz, *supra* note 178, at 2165–66.

197. *Id.* at 2164.

198. *See id.* at 2166.

police request consent. In fact, five states have effectively banned the use of consent searches after public outcry.[199]

In addition to the check against police abuse that the political process provides, the Constitution mandates further procedural safeguards for special needs searches. To be reasonable under the Fourth Amendment, a special needs search program must be sufficiently narrowly tailored to the government interest in order to minimize the privacy intrusion.[200] In practice, courts typically focus on the degree of discretion officers have in conducting the search. For instance, the New York City subway search program was held constitutional in part because "police exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority."[201] Similarly, many special needs searches simply stop everyone who falls within the scope of the program, affording no opportunity for illegal discrimination.[202] It is the strength of these procedural safeguards, not police requests for consent, that prevents racial discrimination.

2. Special Needs Searches Without Consent

In practice, eliminating consent as an element of special needs searches would not significantly affect citizens' lives. In the subway search context, passengers would be required to permit police to search their bags, even if they offered not to ride the subway. Unlike a *Terry* frisk, this search would be limited to the bag, since officers "must limit their inspection to what is minimally necessary to ensure that the . . . item does not contain an explosive device."[203] Therefore, the procedural protections required for the special needs doctrine result in much less intrusive searches than could be permitted under current law.

199. *See* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2187–88 (2006) (noting that Hawaii, Minnesota, New Jersey, and Rhode Island banned consent searches, and California Highway Patrol adopted regulations prohibiting consent requests).

200. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) ("[W]e generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests.").

201. MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006).

202. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 660 (1989); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 609 (1989); United States v. Martinez-Fuerte, 428 U.S. 543, 546 (1976).

203. *MacWade*, 460 F.3d at 265 (alteration in original) (internal quotation marks omitted).

In other areas of special needs search law, the practical impact of this proposed doctrinal shift would be similarly minimal. In the drug-testing cases, an employee who refused to consent to the drug test could be fired or suspended for long periods,[204] so calling the drug tests mandatory instead of consensual is simply being honest. For highway searches, the Court has already upheld a nonconsensual checkpoint,[205] and in the Ohio interstate study discussed above, two drivers who refused to consent had their cars searched anyway.[206] A study by the New York State Attorney General's office found that police regularly physically detain and even frisk based on the fact that a suspect "was observed entering and exiting a known drug location," got "in and out of a vehicle several times," had a bulge in his clothing, was pacing nervously, wore "suspicious clothing," or was "out of place" in a given location,[207] despite the fact that none of these stated rationales rise to the level of reasonable articulable suspicion.[208] William Stuntz argues that, in practice, courts will uphold such searches unless "a police officer behaves with a higher level of coercion than is ordinary and reasonable in a brief street encounter."[209] Even where police behave unreasonably, such conduct is often never reported.[210] Eliminating consent in special needs searches therefore brings greater honesty to police practices while entailing few costs to civil liberties.

Nonetheless, there are instances where an individual would prefer not to consent to a police search program for perfectly legitimate reasons. For example, in the opening hypothetical, the backpack could contain any manner of legal items that most "would prefer to keep private, such as personal grooming items, medications, sexual aids, or controversial printed matter, to name just a few."[211] In such circumstances, it would seem that eliminating consent extracts real social costs. In reality, nothing could be further from the truth. First, as the New York State Attorney General's report suggests, police can often manufacture a basis to conduct a

204. *Von Raab*, 489 U.S. at 663; *Skinner*, 489 U.S. at 610–11.

205. *Sitz*, 496 U.S. at 463 (Stevens, J., dissenting) (noting the checkpoint upheld by the majority is reliant on surprise).

206. *See* Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

207. *See* STOP & FRISK REPORT, *supra* note 194, at 137–38, 41 tbl.II.A.1.

208. *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (requiring "reasonable and articulable facts" sufficient for a "man of reasonable caution" to believe that the search was appropriate).

209. Stuntz, *supra* note 178, at 2170 n.102.

210. *See, e.g.*, STOP & FRISK REPORT, *supra* note 194, at 76–78.

211. Nadler, *supra* note 71, at 208 n.188.

Terry stop and frisk.[212] No matter how personal or embarrassing the contents of the backpack, most people would have great difficulty refusing consent after being stopped and frisked.[213] Second, no one other than the officer conducting the search would see the embarrassing item,[214] and "[o]fficers may not attempt to read any written or printed material."[215] Third, although the search would not require consent, the Supreme Court has left open the possibility that a search conducted in a "particularly offensive manner" may be unreasonable.[216] Finally, since the search would likely happen with or without a consent requirement[217] and would incur minimal social costs,[218] it is better for the law to be honest and abandon the consent requirement for special needs searches since it is the procedural protections, not consent, that protect civil liberties.

B. Consent Should Remain a Valid Exception to the Fourth Amendment Requirements for Ordinary Searches and Seizures

Although police requests for consent to search are implicitly coercive for a variety of psychological and institutional reasons,[219] implicit pressure is the most sensible way for police to provide public safety. Liberal society is premised on the idea that individuals have conceded the coercive authority necessary to enforce rights to the government in return for evenhanded application of the law.[220] As sociologist Max Weber explained, the most stable and least costly system of governance is one premised on laws accepted by citizens

212. *See* STOP & FRISK REPORT, *supra* note 194, at 137–45; *see also Terry*, 392 U.S. at 10 (favorably noting the argument that officers require "an escalating set of flexible responses, graduated in relation to the amount of information they possess" when "dealing with the rapidly unfolding and often dangerous situations on city streets").

213. *See supra* Parts I.B.2.a–b.

214. *See* MacWade v. Kelly, 460 F.3d 260, 265 (2d Cir. 2006).

215. *Id.*

216. United States v. Arnold, 533 F.3d 1003, 1008 (9th Cir. 2008) (quoting United States v. Flores-Montano, 541 U.S. 149, 155 n.2 (2004)) (internal quotation marks omitted).

217. *See* Nadler, *supra* note 71, at 201–03 (discussing research by Illya D. Lichtenberg).

218. *See MacWade*, 460 F.3d at 265 (stating "a typical inspection lasts for a matter of seconds").

219. *See supra* Part I.B.2.

220. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press, 3d ed. 1988) (1690) (arguing that people concede power to government in exchange for protection of property and safety).

as a source of legitimate authority.[221] Honestly admitting that police engage in implicit social pressure is vastly preferable to requiring police to use only physical coercion to enforce the law. Since citizens are ultimately the source of laws in a democratic society, they will accept enforcement of those laws by the police. And because citizens have been socialized to accept the police as the legitimate enforcers of the laws, they will accede to police requests for consent rather than force police to use physical coercion.

III.
THE BENEFITS AND DEFENSES OF HONEST COUNTERTERRORISM POLICING

This section argues that the proposal presented in Part II makes policing more honest, which will induce greater compliance with the law. It then defends the argument presented in Part II against two criticisms. First, this section addresses the argument that removing consent from special needs reasonableness analysis will result in racially discriminatory enforcement and abusive police practices. Second, this section addresses the argument that abandoning the theoretical ideal of consent will lead to more coercive policing and greater infringements on civil liberties.

A. The Benefits of Honest Policing

Perhaps honesty is the greatest consequence of abandoning consent in special needs searches. Honesty is important both theoretically and empirically. According to standard moral theories, criminal law punishes violators because they are culpable and as a means to deter future wrongdoing.[222] Many scholars claim that the law also has an "expressive" function, that is, that laws express and shape norms and values.[223] However, if people perceive these

221. *See generally* MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY (1962) (explaining that valid and legitimate authority results in a more stable form of government); MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1964) (same).

222. *See, e.g.*, Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454–56 (1997).

223. *See, e.g.*, Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1593–94 (2000); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951–55 (1995); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039 (1999); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meaning, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD.

norms to be unjust or hypocritical, then they will be less likely to obey the law.[224]

Multiple studies have demonstrated that people are less likely to obey norms perceived to be unjust. Psychologist Tom Tyler's work suggests that citizens' attitudes toward the law and those who enforce it depend not on the outcomes of their encounters, but on whether they felt they were treated fairly.[225] Yet empirical research shows that those subject to consent searches overwhelmingly feel negatively affected by the police encounter—resulting in feelings of violation and embarrassment as well as a sense that their personal rights have been infringed.[226] These negative experiences often cause people to have lasting negative attitudes towards the police.[227]

By pretending to ask for consent to search, police may be decreasing individuals' respect for the law, which in turn may create lawbreakers rather than deter crime. There is experimental support for the idea that diminished respect for a law will induce people to break not only that law, but other laws as well. In one study, participants were asked over the phone about both their and others' experiences with the IRS.[228] Those who had friends, neighbors, or coworkers who were made to pay more taxes than they supposedly owed expressed both lower perceptions of the fairness of the tax

725, 726 (1998); Robinson & Darley, *supra* note 223, at 471–73; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

224. *See* David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship,* 87 GEO. L.J. 1059, 1090–91 (1999) (arguing that, for people who distrust the legal system, violation of the law is often "romanticized, idealized, condoned, or even celebrated"); *cf.* COLE, *supra* note 140, at 171–72 (1999) (noting that those who view police performance unfavorably are less likely to comply with the law).

225. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 41–68 (1990) (explaining how people's perceptions about the fairness or unfairness of procedures used by law enforcement have a significant effect on their satisfaction with authority generally); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 378, 379 tbl.3 (2001) (finding that people have more trust in the police and courts when officers and judges make their decisions using fair procedures). Tyler's research prompted Professor Stuntz to propose a "manners" test for the constitutionality of a police seizure based on dignity. *See* Stuntz, *supra* note 178, at 2172–76.

226. *See* Nadler, *supra* note 71, at 212 (noting that 74% of respondents in Illya Lichtenburg's Ohio interstate study expressed negative feelings about their consent search experience).

227. *See id.* at 212–13.

228. *See* Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement*, *in* WHY PEOPLE PAY TAXES 259, 263–76 (Joel Slemrod ed., 1992) (describing the results of a 1988 telephone survey about tax compliance).

code generally and greater intentions to cheat on their taxes in the future.[229] In another study, participants were initially shown newspapers articles written to be just, unjust, or neutral.[230] Participants were then asked to fill out a questionnaire indicating their likelihood to engage in a variety of illegal behaviors unrelated to the topic of the article.[231] Those shown the unjust newspaper article expressed a greater willingness to break the law.[232] This led the experimenter to conclude that "the belief that a particular law is unjust increases the likelihood of flouting the law in one's own daily life (even laws that are unrelated to the unjust law in question)."[233] Therefore, by eliminating the legal hypocrisy through abandoning consent in special needs searches, a doctrinal shift can promote greater respect for and compliance with the law.

B. Political and Procedural Checks on Discrimination

Removing consent from the reasonableness analysis of special needs searches will not result in police discrimination or abuse for two reasons. First, the high visibility and social costs of programmatic searches will ensure a political check on their use.[234] Second, despite lacking a consent requirement, special needs searches still need strong procedural safeguards to be reasonable under the Fourth Amendment.[235]

The political process is an effective check on police abuse in programmatic searches because police will face political pressure if they use unduly harsh tactics against large numbers of people.[236] However, the political process could be less effective at preventing racial discrimination. There are two ways police could use special needs searches in a discriminatory manner. First, they could locate

229. *See id.* at 276.

230. For example, the just version of a newspaper article on civil forfeiture "[e]mphasized the law enforcement benefits," while the unjust version "[e]mphasized the civil liberties concerns surrounding civil forfeiture laws." Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1412–13 & tbl.1 (2005). Neutral articles "were filler stories" on topics such as "movie ushers." *Id.* at 1412.

231. *See id.* at 1411, 1414.

232. *See id.* at 1414–16.

233. *Id.* at 1410.

234. *See* Stuntz, *supra* note 178, at 2165–66.

235. *See, e.g.*, MacWade v. Kelly, 460 F.3d 260, 273 (2006) (upholding New York City's subway search program, in part, because police "search only those containers capable of concealing explosives," "do not read printed or written material or request personal information," and "exercise no discretion in selecting whom to search, but rather employ a formula that ensures they do not arbitrarily exercise their authority").

236. *See supra* Part II.A.1.

the checkpoint in a predominantly minority neighborhood. Second, they could only stop people of a certain race at checkpoints (i.e., engage in racial profiling). With respect to the former, the transparency of the police tactics against an entire neighborhood could still provoke a sufficient political check, since "[v]isiblity is a powerful regulatory tool."[237] With respect to the latter, William Stuntz argues that the risk of racial profiling in a search program is less than for individualized searches, since individual searches can be done pretextually.[238] Nonetheless, such political protections can break down when the discrimination is directed against disliked minorities who cannot effectively exert electoral pressure.[239] For instance, if the New York City subway search program only stopped Middle Eastern-looking men, it is not clear this group has sufficient political clout to do anything about it.[240] Therefore, the political process alone is insufficient to prevent racial discrimination in special needs searches. However, when political checks are combined with the procedural protections courts require for programmatic searches, racial discrimination can be effectively prevented.

Constitutionally mandated procedural limitations on special needs searches are primarily designed to limit police discretion in

237. Stuntz, *supra* note 178, at 2167. *But see* Matthew J. Spriggs, Note, *"Don't Tase Me Bro!" An Argument for Clear and Effective Taser Regulation*, 70 OHIO ST. L.J. 487, 487–88 (2009) (discussing the controversy that developed after six campus officers tased a student in public and in front of cameras).

238. *See* Stuntz, *supra* note 178, at 2176–80.

239. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); JOHN HART ELY, DEMOCRACY AND DISTRUST 172 (1980) (arguing for a democratic process-based approach to Fourth Amendment law as a prophylactic against unequal treatment).

240. It is worth mentioning that public choice theory predicts the precise opposite, since a small, homogenous group facing concentrated costs would have lower organizing costs to form an interest group to combat these costs. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 22–36 (1965) (explaining advantages that concentrated interests, such as regulated industries, have over diffuse interests in the political process). *See generally* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (offering an economic model wherein relatively small groups provides the "supply side" of regulation); Gordon Tullock, *Some Problems of Majority Voting*, 67 J. POL. ECON. 571 (1959) (explaining the development and effects of coalitions among concentrated benefit-receivers vs. diffuse cost-bearers). Nonetheless, "[i]f the cost-bearers are sufficiently few . . . or if there are barriers to their coalescing to fight the relevant government action," such as some targets not being citizens, then "the government is likely to find it temping to concentrate costs." Stuntz, *supra* note 178, at 2165 n.87.

order to prevent police abuse and discrimination.[241] Nonetheless, some opportunities for racial discrimination still exist. Within special needs programs, officers often have "wide discretion" to select individuals for secondary screening.[242] However, unlike individualized searches, special needs searches are performed with many others watching and regularly affect many people.[243] Therefore, the political process will help protect against police abusing their discretion for secondary screenings. Moreover, the experience of the search is likely to be less "harmful" for individuals when others around them also are stopped.[244] In such circumstances, the procedural and political checks work together to prevent both police abuse and racial discrimination. Importantly, consent has no role to play in either mechanism.

C. Fighting Hypocrisy in the Law: Lessons from Terry v. Ohio

This subsection responds to the claim that abandoning the ideal of consent will lead to greater infringements on civil liberties by arguing that the benefits of legal honesty outweigh the loss of theoretical legal protections.[245] Specifically, a more honest law that better reflects social reality will provide greater legal protection in practice than idealized legal principles. This subsection proceeds by examining a similar debate concerning another type of proactive policing: stops and frisks.

In *Terry v. Ohio*, the Supreme Court held that police stops, and associated frisks, may be conducted on less than probable cause.[246] The *Terry* Court recognized that although these activities are searches and seizures within the meaning of the Fourth Amendment,[247] police were engaging in them with impunity, possibly in a racially discriminatory manner.[248] So, although the Court appeared to lower the legal requirement from probable cause, and was heav-

241. *See supra* Part II.A.2.

242. United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 (1976).

243. *See* Stuntz, *supra* note 178, at 2167.

244. *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996) (proposing that the Fourth Amendment is intended to prevent "targeting harm"—singling out an individual "for unfavorable treatment without a legitimate basis"—in addition to "privacy harm").

245. *See supra* Part II.B.

246. 392 U.S. 1, 21 (1968).

247. *See id.* at 18–19.

248. *See id.* at 14–15 & n.11.

ily criticized for doing so,[249] the Court actually raised the practical threshold from effectively nothing to "reasonable . . . articulable suspicion."[250] Far from "tak[ing] a long step down the totalitarian path,"[251] *Terry* brought the law of police stop and frisks more in line with reality, while permitting police to engage in necessary preventive policing.[252] Moreover, it created additional legal safeguards to protect against police abuse and racial discrimination.

Removing consent from the reasonableness analysis of special needs searches would extend the reasoning of *Terry* and have similar salutary effects. As in *Terry*, this doctrinal shift appears to lessen "beneficial aspects" of Fourth Amendment protections that "minimize intrusiveness."[253] But, in reality, requiring police to request consent provides little, if any, protection to individuals.[254] The real limitations on police power in special needs searches come from the political process and procedures that limit police discretion.[255] Therefore, acknowledging the current implicit social coercion in police requests for consent would not lessen individuals' civil liberties and would alter legal doctrine to better reflect reality. Much like *Terry*, removing consent appears to lower the legal standard but actually raises it. Moving away from consent as a factor in courts' reasonableness analysis enables courts to focus on the remaining procedural requirements for special needs searches that actually protect citizens' civil liberties. Just as *Terry* honestly admitted police officers' ability to detain and frisk suspects without facing any major legal hurdles,[256] this doctrinal shift will permit effective protection against terrorism, while avoiding current legal hypocrisy.

249. *See, e.g.*, *id.* at 35–39 (Douglas, J., dissenting); Scott E. Sundby, *Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 411–14 (1988) (discussing *Terry* and criticizing the Court for failing to articulate a coherent and systematic view of when the reasonableness test applies); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 965–73 (1999) (criticizing *Terry* for brushing over the racial component of the program).

250. *See Terry*, 392 U.S. at 33 (Harlan, J., concurring); *id.* at 21 (majority opinion).

251. *Id.* at 38 (Douglas, J., dissenting).

252. *See id.* at 33 (Harlan, J., concurring) ("There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.").

253. MacWade v. Kelly, 460 F.3d 260, 275 (2d Cir. 2006).

254. *See supra* Part I.B.2.

255. *See supra* Part III.B.

256. *See Terry*, 392 U.S. at 14–15.

CONCLUSION

The Supreme Court has already laid the groundwork for abandoning consent in special needs searches. In *Michigan Department of State Police v. Sitz*, the Court upheld a sobriety checkpoint that did not include a consent requirement.[257] By ignoring consent, the Court freed itself to focus on the meaningful procedural safeguards necessary to ensure civil liberties in special needs searches.[258] The Court need only take its analysis one step further by acknowledging that police requests for consent in special needs searches are implicitly coerced.[259] By doing so, the Court can end the hypocrisy of current legal doctrine and bring honesty to the law.

257. 496 U.S. 444, 463 (1990) (Stevens, J., dissenting).
258. *See id.* at 450–55 (majority opinion).
259. *See supra* Part I.B.2.

THE FLIP SIDE OF REMOVAL: BRINGING APPOINTMENT INTO THE REMOVAL CONVERSATION

*ANDERSON P. HESTON**

INTRODUCTION

In July of 2010, the Supreme Court did something it hadn't done since the Coolidge Administration: strike down a statute for unconstitutionally restricting the President's power to remove his subordinates. Judge Brett Kavanaugh of the D.C. Circuit noted the moment's significance, calling the case "the most important separation-of-powers case regarding the President's appointment and removal powers . . . in the last 20 years."[1] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court held by a five-to-four majority that certain provisions from the Sarbanes-Oxley Act[2] unconstitutionally restricted the President's power to fire members of the Public Company Accounting Oversight Board, a regulatory body created by Sarbanes-Oxley.[3]

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1. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

2. Sarbanes-Oxley Act of 2002 §§ 101, 107, 15 U.S.C. §§ 7211, 7217 (2006).

3. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151, 3154 (2010).

The Supreme Court has considered the President's removal authority only a handful of times. The first case to address the issue was *Myers v. United States*, decided in 1926, in which the Court held that the Appointments Clause[4] prevented Congress from restricting the President's authority to remove a postmaster.[5] Ten years later, the Court significantly limited *Myers*' reach: in *Humphrey's Executor v. United States*, the Court held that no constitutional principle prevented Congress from creating independent agencies whose principal officers could be removed only upon a showing of good cause.[6] As recently as 1988, the Court reaffirmed that *Humphrey's Executor* remained good law.[7] Despite the majority's protestations to the contrary,[8] *Free Enterprise Fund* has called this entire line of jurisprudence into question.[9]

What the *Free Enterprise Fund* majority ignores is that the office of the Presidency in 2010 is fundamentally different from that office in 1926. To the extent that the Court is concerned with removal restrictions limiting the President's control over the independent agencies, its concern is misplaced. If anything, the President's influence over agency policymaking has been steadily on the rise. The expansion of the administrative state has moved the locus of federal policymaking away from Congress and toward the White House. The White House has aggressively expanded the President's authority over the agencies. The judicial branch has deferred to the President's expanding control of the regulatory process. These developments have increasingly marginalized Congress's role with respect to the agencies, and the President is often able to treat the independent agencies as falling fully under the umbrella of his own authority.

Yet the Court's concern with staffing the agencies is not entirely misplaced. The federal government presently suffers from a severe leadership deficit—not because the wrong people are in power, but because so many offices are left empty or occupied by acting officials. The consequences of our understaffed government

4. 5 U.S. CONST. art. II, § 2, cl. 2.

5. Myers v. United States, 272 U.S. 52, 163–64 (1926).

6. Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).

7. *See* Morrison v. Olson, 487 U.S. 654, 686 (1988).

8. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3160 (2010) ("Nothing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.").

9. *Id.* at 3179 (Breyer, J., dissenting) ("I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security . . . constitutionally at risk.").

can be disastrous: the poor intelligence that failed to prevent the attacks of September 11, the inept governmental response to Hurricane Katrina, and the immediate aftermath of the financial crisis of 2008 were all exacerbated by understaffed agencies.

What is to blame for understaffing at the highest levels? More than anything else, it is modern Senate confirmation politics. Since the increase of party polarization during the Reagan Administration, it has taken Presidents longer and longer to staff the administrative agencies.[10] Thus the Supreme Court's historic focus on removal as the marker of presidential influence over the independent agencies no longer controls. Today, the foremost challenge to the President's ability to use the independent agencies to implement his preferred policies is not removing recalcitrant officials, but rather appointing sympathetic ones. Whether one agrees with the President's policies or not, both sides of the aisle should be able to agree that regulatory failures by understaffed agencies show that prolonged confirmation fights do more harm than good.

This Note proceeds as follows. Part I traces the Supreme Court's removal jurisprudence and examines the way in which the President's authority to remove an official has come to signify the President's authority to direct independent agency policy. Part II calls this assumption into question by examining the degree to which the President is able to exert his influence on the independent agencies, despite statutes restricting the removal of independent-agency officials. Part III examines what has become the primary restraint on the President's ability to direct the agencies: the confirmations process.

I.
THE SUPREME COURT'S REMOVAL JURISPRUDENCE

The Constitution does not address the President's power to remove federal employees. Rather, the Supreme Court's removal jurisprudence traces its constitutional basis to the Appointments Clause:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall

10. *See* discussion *infra* at Part III.A (discussing increased time-lags between the President's nomination of an agency official and that official's confirmation).

> be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[11]

Though *Marbury v. Madison* is better remembered for establishing principles of judicial review, the decision also marks the Supreme Court's first consideration of the President's power to remove appointed officers.[12] After he determined that Marbury's right to his position as a justice of the peace vested when the President signed Marbury's commission, Chief Justice Marshall found no constitutional problem with Congress's limiting the President's power to remove executive-branch officials like Marbury: "Mr. Marbury . . . was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country."[13] If Congress said Marbury was to serve five years, Marbury was to serve five years.

In the first twentieth-century case considering the President's removal authority, however, the Court came to the opposite conclusion. In 1926, the Court in *Myers v. United States* ruled unconstitutional a statute limiting the President's authority to remove postmasters first class.[14] The statute creating this position provided that postmasters first class were to be "'appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.'"[15] In a lengthy opinion, Chief Justice Taft examined debates within the First Congress before concluding that the power of removal is incident only to the power of appointment, and not to the power of advising and consenting to appointment.[16] Because the Constitution entrusts to the President the exclusive responsibility of taking care that the laws be faithfully executed,[17] the President must enjoy unrestricted power of removal.

11. U.S. CONST. art. II, § 2, cl. 2.

12. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

13. *Id.* at 162. Of course, despite Justice Marshall's finding that Marbury's right to his commission had vested, Marbury's suit to enforce that right was unsuccessful, as Justice Marshall held that the Judiciary Act of 1789's grant of original mandamus jurisdiction to the Supreme Court exceeded the bounds of Article III. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 13–15 (5th ed. 2007).

14. Myers v. United States, 272 U.S. 52, 176 (1926).

15. *Id.* at 107.

16. *Id.* at 122.

17. U.S. CONST. art. II, § 3, cl. 3.

Not ten years after *Myers*, the Court did an about-face. After taking office in 1933, President Franklin Roosevelt wrote William E. Humphrey, a Commissioner on the Federal Trade Commission (FTC), to ask for Humphrey's resignation.[18] When Humphrey refused to resign, Roosevelt wrote Humphrey in October of 1933 to inform him that he was being removed from the Commission.[19] After Humphrey's death four months later, Humphrey's executor sued to recover the balance of Humphrey's salary, claiming that President Roosevelt had dismissed Humphrey unlawfully.[20] The statute establishing the FTC provided that the President could remove its Commissioners only for "inefficiency, neglect of duty, or malfeasance in office"[21]—a seemingly impermissible restriction after *Myers*'s announcement of the President's unrestricted removal authority.[22] However, in *Humphrey's Executor* the Court found no constitutional problem with the statutory removal provision,[23] distinguishing *Myers* by looking to the type of office in question. According to Justice Sutherland, *Myers* involved "an executive officer restricted to the performance of executive functions."[24] Over these types of offices Congress could not restrict the President's removal authority.[25] FTC Commissioners exercised what the Court called "quasi-legislative or quasi-judicial powers,"[26] however, and for these types of officers, Congress's authority "to require them to act in discharge of their duties independently of executive control cannot well be doubted."[27]

18. President Franklin Roosevelt wrote, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence." Humphrey's Ex'r v. United States, 295 U.S. 602, 618–19 (1935).

19. *Id.* at 619.

20. *Id.* at 618–19.

21. *Id.* at 620.

22. Myers v. United States, 272 U.S. 52, 134 (1926) ("The imperative reasons requiring an *unrestricted power to remove* the most important of [the President's] subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.") (emphasis added).

23. *Humphrey's Ex'r*, 295 U.S. at 629 (describing Congress's authority to "fix the period during which [FTC Commissioners] shall continue in office, and to forbid their removal except for cause in the meantime").

24. *Id.* at 627.

25. *Id.* at 627–28 ("[T]he necessary reach of the [*Myers*] decision goes far enough to include all purely executive officers.").

26. *Id.* at 628.

27. *Id.* at 629.

In *Humphrey's Executor*, the text of the statute in question clearly restricted the President's removal authority. In its next case considering the President's removal power, the Court inferred congressional intent to restrict the President's removal authority, even though the relevant statute was silent on the issue. In *Wiener v. United States*, decided in 1958, the Court held that the President could not remove a member of the War Claims Commission (WCC) without cause for doing so.[28] Though the statute said nothing about the removal of Commissioners, the Court reasoned that the WCC was a quasi-judicial body and that "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."[29] According to *Wiener*, *Humphrey's Executor* had drawn a "sharp line of cleavage" between executive officials and quasi-legislative or quasi-judicial officials.[30] *Myers* protected the President's power to remove the former; *Humphrey's Executor* protected Congress's power to limit the President's authority to remove the latter.[31]

For almost fifty years, *Humphrey's Executor* and *Wiener* remained the rule on Congress's ability to restrict the President's removal authority. In 1988, however, the Court again reversed course. In *Morrison v. Olson*, the Court dispensed with the distinction between executive and quasi-legislative or quasi-judicial officials and upheld the constitutionality of the Ethics in Government Act of 1978.[32] The Ethics in Government Act established a framework for the investigation and prosecution of high-ranking government officials for violating federal criminal statutes.[33] It provided for the appointment of an independent counsel to prosecute any suspected wrongdoing[34] and authorized the independent counsel to exercise all investigative and prosecutorial functions and powers of the Department

28. Wiener v. United States, 357 U.S. 349, 356 (1958). President Eisenhower wrote to Wiener: "'I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection.'" *Id.* at 350.

29. *Id.* at 352, 355–56.

30. *Id.* at 353.

31. *Id.* at 352–53 (suggesting that there was a sharp division between "officials who were part of the Executive establishment and were thus removable by virtue of the President's removal powers," and independent-agency officials, "as to whom a power of removal exists only if Congress may fairly be said to have conferred it").

32. Morrison v. Olson, 487 U.S. 654, 680–81, 689 (1988).

33. *Id.* at 660.

34. *Id.* at 661. Note that the appointment of the special prosecutor was made not by the President or Attorney General but by the Special Division, a tribunal created by the Act.

of Justice and the Attorney General.[35] Once appointed, the independent counsel was removable only by the Attorney General and only for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."[36] All parties agreed that prosecution was a quintessentially executive function[37]—thus it would seem *Myers* should have applied and the statute should have been found unconstitutional. Still, the Court saw no problem with Congress's restricting the President's ability to remove the independent counsel. According to Chief Justice Rehnquist:

> [O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed . . . to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.[38]

The *Morrison* Court further distinguished *Myers*: the issue at hand in *Myers*, Rehnquist wrote, was not the type of office the postmaster occupied, but rather that Congress had inserted itself into the removal process.[39] Because Congress played no part in removing the independent counsel, the Ethics in Government Act did not violate the separation of powers.[40]

In many ways, the *Morrison*-era jurisprudence represents the high-water mark of the Supreme Court's deference to congressional restriction of the President's removal authority—as well as the Court's tolerance for unusual agency structures. The year after *Morrison*, the Court in *Mistretta v. United States* upheld the constitutionality of a statute creating a Sentencing Commission composed

35. *Id.* at 662.

36. *Id.* at 663.

37. *Id.* at 691 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."); *see also id.* at 706 (Scalia, J., dissenting) ("[P]rosecution of crimes is a quintessentially executive function.").

38. *Morrison*, 487 U.S. at 689–90 (citation omitted).

39. *Id.* at 686 ("Congress' attempt to involve itself in the removal of an executive official was found to be sufficient grounds to render the statute invalid.").

40. *Id.* at 692–93 ("This is not a case where the power to remove an executive official has been completely stripped from the President.").

in part of members of the federal judiciary.[41] In addition to their normal adjudicative duties, judges appointed to the Commission assumed responsibility for promulgating sentencing guidelines for use in the federal courts.[42] Facing a sentence calculated in accordance with guidelines, Petitioner John Mistretta challenged the constitutionality of the Commission, arguing that placing Article III judges on the Commission "effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary's independence and integrity."[43] The Court acknowledged "serious concerns about a disruption of the appropriate balance of governmental power among the coordinate [b]ranches,"[44] but it nonetheless dismissed these concerns as "'more smoke than fire.'"[45] To be sure, the Sentencing Commission was an unprecedented experiment, but, according to Justice Blackmun, "Our constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."[46]

Twenty years after *Morrison* and *Mistretta*, the Court has again changed course. In the final days of its 2010 session, the Court struck down part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or the Act).[47] Among other things, Sarbanes-Oxley created a body known as the Public Company Accounting Oversight Board (PCAOB or the Board).[48] The Board, which is responsible for regulating certain accounting firms, is comprised of five members appointed by the Securities and Exchange Commission (SEC) Commissioners.[49] The Act provided that Board members, who serve five-year terms, could be removed only by the SEC Commissioners, and only for "good cause shown."[50] Thus Board members enjoyed what the Court called "two layers of for-cause tenure": the President may remove SEC Commissioners only for "inefficiency, neglect of duty, or malfeasance in office,"[51] and the SEC Commissioners, in

41. Mistretta v. United States, 488 U.S. 361, 412 (1989).

42. *Id.* at 384–85.

43. *Id.* at 383.

44. *Id.* at 384.

45. *Id.*

46. *Id.* at 385.

47. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151, 3161 (2010) (holding that the removal restrictions under 15 U.S.C. §§ 7211(e)(6) and 7217 (d)(3) violate separation of powers).

48. 15 U.S.C. § 7211(a) (2006).

49. § 7211(c), (e)(1), (6).

50. § 7211(e)(5)–(6).

51. Note that the statute creating the SEC says nothing about removal of Commissioners; rather, the parties agreed that SEC Commissioners enjoyed the same tenure protection as described in *Humphrey's Executor*. In his dissent, Justice

turn, could remove the Board members only for good cause shown.[52] In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court reversed the D.C. Circuit and held that the Board's two layers of tenure protection violated the Appointments Clause.[53] "The growth of the executive branch," Chief Justice Roberts wrote in the majority opinion, "heightens the concern that it may slip from the Executive's control, and thus from that of the people."[54] Justice Roberts later warned of Congress's "reduc[ing] the Chief Magistrate to a cajoler-in-chief."[55]

Justice Breyer, joined by Justices Stevens, Ginsburg, and Sotomayor, dissented. Justice Breyer began his opinion by citing Justice Jackson's "wise perception that 'the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.'"[56] According to Justice Breyer, in light of the dramatic expansion of the federal government—from 2400 employees at the Founding to 4.4 million in 2010—the Court should rely on a functional approach to the separation of powers, rather than the formalistic one adopted by the majority.[57] As a practical matter, the removal restrictions were insignificant: "[O]nce we . . . view the removal provision at issue in the context of the entire Act, its lack of practical effect becomes readily apparent."[58] Given that many positions within the civil service enjoy some degree of removal protection, Justice Breyer also warned of unintended consequences of the majority's ruling: "I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security . . . constitutionally at risk."[59] To illustrate his point, Justice Breyer appended to his dissent nearly thirty pages of tables listing

Breyer took issue with this assumption: "How can the Court simply assume . . . that the SEC Commissioners themselves are removable only 'for cause'? . . . [T]he Court has . . . created a constitutional defect in a statute and then relied on that defect to strike a statute down as unconstitutional." *Free Enter. Fund*, 130 S. Ct. at 3182 (Breyer, J., dissenting) (emphasis omitted).

52. 15 U.S.C. § 7211(e)(6).

53. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010).

54. *Id.* at 3156.

55. *Id.* at 3157.

56. *Id.* at 3167 (Breyer, J., dissenting) (emphasis omitted) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

57. *Id.* at 3168 (Breyer, J., dissenting).

58. *Id.* at 3172 (Breyer, J., dissenting).

59. *Id.* at 3179 (Breyer, J., dissenting).

various federal positions potentially affected by the Court's decision.[60]

The difference between the *Free Enterprise Fund* majority and the *Morrison*-era jurisprudence is striking. Where in 1989 (one year after *Morrison*) the Court suggested that "[o]ur constitutional principles of separation of powers . . . are not violated by mere anomaly or innovation,"[61] in *Free Enterprise Fund* the Court quoted favorably from Judge Kavanaugh's dissent in the D.C. Circuit opinion: "'Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.[62] Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure.'"[63] According to Chief Justice Roberts, the novel structure not only added to the Board's independence, but transformed it.[64]

It is difficult to say how important *Free Enterprise Fund* will be in future constitutional litigation. Despite Justice Breyer's dissent, the idiosyncratic PCAOB structure has few analogues, and the case may have limited application beyond its facts.[65] Yet what is salient is the degree to which the Court reaffirmed the principle established in *Myers*: the President's ability to control an agency is a direct function of his power to remove its officials. Without the ability to remove PCAOB members at will, the majority cautioned, "The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[66]

When viewed through the lens of the modern Presidency, Justice Roberts's concern about Congress's stripping the President's power with a statutory removal restriction seems farfetched. The great mystery of the independent agencies is that, particularly for the number of times the Supreme Court has considered their con-

60. *Id.* at 3185–215 (Breyer, J., dissenting).

61. Mistretta v. United States, 488 U.S. 361, 385 (1989).

62. *Free Enter. Fund*, 130 S. Ct. at 3159 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

63. *Id.* at 3159.

64. *Id.* at 3154.

65. *See* Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y SPECIAL ISSUE 1, 2–3 (2010).

66. *Free Enter. Fund*, 130 S. Ct. at 3154.

stitutionality,[67] there is scant evidence that removal restrictions exert significant influence on presidential behavior. Presidents do not seem to test the limits of their removal authority by removing the heads of independent agencies.[68] Nor has the Supreme Court ever had occasion to consider what constitutes "good cause" in the context of an officer's removal, or what "inefficiency, neglect of duty, or malfeasance in office" (the standard in many statutory removal restrictions) might mean.[69] It is certainly possible that removal restrictions isolate the independent agencies from political pressure and thereby pose a strong impediment to the President using the administrative agencies to implement his policy preferences. A far more likely hypothesis, however, is that removal restrictions simply do not matter as much as the *Free Enterprise Fund* court suggests. As the next section will show, despite the *Free Enterprise Fund* majority's concerns about the independent agencies "slip[ping] from the Executive's control,"[70] the President is often able to treat the independent agencies as extensions of the Executive Branch and fully within the grasp of the White House.

II.
PRESIDENTIAL CONTROL OF THE INDEPENDENT AGENCIES

Clearly the President has a strong interest in staffing the independent agencies with people of his choosing, and removing uncooperative officials is part of the President's challenge. Yet the infrequency with which removal challenges are litigated suggests that the President possesses powerful tools to bring his influence to bear on the independent agencies, such that uncooperative officials attempting to implement policies other than the President's preferred ones will find themselves swimming upstream. Resignation (and a subsequent private sector position) may seem a more appealing alternative than doing battle with the President of the

67. *See* discussion *supra* Part I (discussing *Myers*, *Humphrey's Executor*, *Morrison,* and *Free Enterprise Fund*).

68. Harold H. Bruff, *Bringing the Independent Agencies in from the Cold*, 62 VAN. L. REV. EN BANC 63, 68 (2009), *available at* http://www.vanderbiltlawreview.org/articles/2009/11/Bruff-62-Vand-L-Rev-En-Banc-63.pdf.

69. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994).

70. *Free Enter. Fund,* 130 S. Ct. at 3156.

United States.[71] Indeed, few independent-agency officials serve their entire term in office.[72]

Thus the modern President enjoys great influence over even the independent agencies' policymaking. The President's increasing ability to direct independent-agency policymaking may be traced to three sources: OMB and OIRA review, judicial deference, and the President's informal jawboning. The following sections will address these factors in turn.

A. OMB Review, OIRA Review, and Presidential Influence

Among administrative law scholars, the Reagan Presidency marks the start of an ongoing revolution. One month after taking office, Reagan issued Executive Order 12,291, which required each executive agency to submit to the White House's Office of Information and Regulatory Affairs (OIRA) a "regulatory impact analysis" of all its proposed major rules.[73] Four years later, Reagan issued Executive Order 12,498, which required each executive agency to submit to the Office of Management and Budget (OMB) an annual regulatory plan listing its proposed actions for the upcoming year.[74] It is difficult to overstate the impact of these two executive orders. During a 1986 congressional inquiry into OMB practices, the OMB Director could think of only six instances in which an agency had promulgated a rule over OMB's objection.[75] Four of these instances were pursuant to court order, and in the other two the agency successfully appealed to the President.[76]

Given the Reagan Administration's deregulatory agenda,[77] many believed that the Clinton Administration would take a differ-

71. *See* Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of* The Unitary Executive *by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 605 (2010).

72. For instance, SEC Commissioners are appointed to 5-year terms, but the average length of service is around 2.5 years; FTC Commissioners are appointed to 7-year terms, but the average length of service is just over 4 years. *See* Daniel E. Ho, Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation 8 (Feb. 12, 2007) (unpublished manuscript), *available at* dho.stanford.edu/research/partisan.pdf.

73. Exec. Order No. 12,291, § 3, 3 C.F.R. 127, 128–30 (1981), *reprinted in* 5 U.S.C. § 601 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001).

74. Exec. Order No. 12,498, 3 C.F.R. 323 (1985) (repealed 1993).

75. Kagan, *supra* note 73, at 2278–79.

76. *Id.*

77. *See, e.g.*, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 481 (2008).

ent approach to coordinating agency policymaking.[78] Clinton's Executive Order 12,866, however, preserved the most important of Reagan's innovations: executive agencies were still required to submit notice of all proposed major rulemakings to OIRA and to present an annual regulatory agenda to OMB.[79] Moreover, the practices established by the Reagan and Clinton Administrations seem like they are here to stay. In January of 2011, President Obama released Executive Order 13,563, entitled "Improving Regulation and Regulatory Review," in which he explicitly reaffirmed the principles expressed in Executive Order 12,866.[80] In light of concern about escalating deficits and the Republicans' midterm victories, President Obama may even have adopted some of Reagan's deregulatory agenda: a critical provision in President Obama's Order requires each executive agency to submit a preliminary plan to OIRA in which the agency reviews its existing significant regulations to determine whether they should be "modified, streamlined, expanded or repealed."[81]

The relationship between these executive orders and the independent agencies is complicated. Each of the above-discussed orders is addressed to all federal agencies, excluding those that are listed as "independent regulatory agenc[ies]" in the Paperwork Reduction Act (PRA).[82] Thus the independent agencies are at least

78. *See, e.g.*, Kagan, *supra* note 73, at 2281 ("[O]bservers might have predicted that when a Democratic President assumed office in 1993, a radical curtailment of presidential supervision of administrative action would follow. Instead, the very opposite occurred.").

79. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

80. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf.

81. *Id.* at 3822.

82. 44 U.S.C. § 3502 (2006)

> [T]he term "independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission . . . .

The PRA does not identify any common feature of these agencies that justifies their designation as "independent regulatory agenc[ies]"; rather, Congress identi-

nominally exempt from OIRA review. But to take the standard definition of "independent agency"—that is, an agency whose top-ranking official or officials can be removed only for cause[83]—and compare it to the list of "independent regulatory agenc[ies]" in the PRA[84] produces anomalous results. The head of the Social Security Administration (SSA), for instance, is removable only for neglect of duty or malfeasance in office,[85] and the statute creating the SSA describes it as "an independent agency in the executive branch;"[86] yet the PRA does not include the SSA in its list of independent regulatory agencies, meaning that the SSA goes through OIRA review as if it were a standard regulatory agency.

Conversely, statutes creating some of the agencies that are listed as "independent regulatory agenc[ies]" by the PRA do not address the President's ability to remove agency's head official and thus do not meet the classic definition of an independent agency. The SEC, for example, is universally regarded as an independent agency, and yet the statute creating the SEC says nothing about removal of Commissioners.[87]

What is one to make of these inconsistencies? The result is a blurring of the line between the independent and regulatory agencies, such that the President's use of OIRA review to assert his authority over the regulatory agencies has concomitantly increased his influence over the independent agencies. It is an open constitu-

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fied them as such without comment. For criticism of the Paperwork Reduction Act's list, see Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L. J. AM. U. 461, 473–74 (1994) (describing the language of the Paperwork Reduction Act as "problematic and ambiguous").

The Regan and Clinton orders each state that the order does not apply to the list in 44 U.S.C. § 3502. *See* Exec. Order No. 12,291, § 1(d); Exec. Order No. 12,866, § 3(b). The Obama order exempts the independent agencies by reference to Clinton's order. Exec. Order No. 13,563, § 7(b) ("For purposes of this order, 'agency' shall have the meaning set forth . . . in Executive Order No. 12,866.").

83. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 46 (3d ed. 1994) ("The characteristic that most sharply distinguishes independent agencies is the existence of a statutory limit on the President's power to remove the head (or members) of an agency."); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except 'for cause.'").

84. 44 U.S.C. § 3502.

85. 42 U.S.C. § 902(a)(3) (2006).

86. *Id.* at § 901.

87. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3182 (Breyer, J., dissenting); *see supra* text in note 51 (describing how the Court in *Free Enterprise Fund* assumed SEC Commissioners were removable only for cause).

tional question whether the President can require independent agencies to undergo OIRA review.[88] Yet, as Peter L. Strauss pointed out in 1984, many independent agencies have nonetheless voluntarily submitted to OIRA review.[89] More recently, Congress seems to have acquiesced to the President's robust use of OIRA to supervise agency policy. For instance, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created the Financial Stability Oversight Council (FSOC), a group whose voting members include both executive officials (like the Secretary of the Treasury) and independent-agency officials (including the Chairmen of the Federal Reserve Board of Governors, the SEC, the Commodities Futures Trading Commission, the Federal Deposit Insurance Corporation, and various other financial-regulatory agencies).[90] By all accounts the FSOC "looks like" an independent agency in the sense that most of its voting members are removable only for cause, and yet Dodd-Frank did not include an amendment to add the FSOC to the list of independent agencies in the PRA. Thus the FSOC must undergo OIRA review as if it were a standard executive agency.[91]

On a less formalistic level, various OIRA Administrators have used the weight of their office to encourage independent agencies to adopt the Administration's policy preferences. For instance, in March 2002, President Bush's OMB invited public suggestions for regulatory reform.[92] More than 1700 public comments were received, nominating 316 different regulations for overhaul.[93] In a January 2003 memorandum addressed to the heads of selected independent agencies, OIRA administrator John Graham pointed out that forty-nine of the complained-about rules were regulations

88. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31 (2010).

89. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 593–94 (1984).

90. 12 U.S.C. § 532(b)(1)(A)–(J) (2006).

91. *See, e.g.*, OIRA, CONCLUSION OF EO 12866 REGULATORY REVIEW (2011), *available at* http://www.reginfo.gov/public/do/eoDetails?rrid=121000. Essentially, the FSOC structure gives the President two bites at the apple: as a voting member of the Council, the Secretary of the Treasury can express the President's views and influence whatever policies the FSOC adopts; OIRA then reviews the entire Council's rulemaking and thus gives the President a second chance to influence FSOC rules.

92. *See* Memorandum from John D. Graham to Heads of Selected Indep. Agencies (Jan. 22, 2003) [hereinafter Graham Memo], *available at* www.reginfo.gov/public/prompt/graham_response_regreform.pdf.

93. *Id.*

promulgated by independent agencies.[94] Graham went on to "request[ ] that the responsible agencies consider these public nominations and, for those they consider to be possible candidates for reform, place their evaluations on their websites."[95] There is some evidence that the independent agencies acted on Graham's request. For instance, Graham asked the FTC to consider its regulations implementing the Truth in Lending Act of 1968 (TILA),[96] a federal consumer-protection law regulating home mortgages.[97] Three months after receiving Graham's memo, the FTC sought OMB approval to conduct an empirical survey of "(1) [h]ow consumers search for and choose mortgages; (2) how consumers use and understand information about mortgages, including required disclosures; and (3) whether more effective disclosures are feasible."[98] It is difficult to say exactly to what extent Graham's memo prompted the FTC's increased attention to TILA, or if the agency's policy position ultimately reflected that of the Administration. Graham's memo says nothing of the substantive policies the Administration wished to put in place and instead directs the agencies to reach out to OMB for details.[99] However, it is fair to say that Graham's memo expressed presidential priorities, and that after receiving the memo the FTC directed its attention to those priorities, suggesting that independent agencies consider the President's policy preferences in their rulemaking.

Current OIRA Administrator Cass Sunstein has similarly used his position to exert influence on the independent agencies. Shortly after the January 2011 release of President Obama's Executive Order 13,563, Sunstein explained the order in a memorandum addressed to the heads of both the executive and the independent agencies.[100] While acknowledging that the order did not apply to the independent agencies, Sunstein nonetheless emphasized that the independent agencies "are encouraged to give consideration to all of [the Order's] provisions, consistent with their legal authority.

94. *Id.* Graham addressed his memorandum to the EEOC, FCC, FERC, Federal Reserve Board, FTC, and SEC. *Id.*

95. *Id.*

96. 15 U.S.C. § 1601 (2006).

97. Graham Memo, *supra* note 92.

98. Agency Information Collection Activities; Proposed Collection; Comment Request, 68 Fed. Reg. 19,825 (Apr. 22, 2003), *available at* http://www.gpo.gov/fdsys/pkg/FR-2003-04-22/pdf/03-9852.pdf.

99. *See* Graham Memo, *supra* note 92.

100. Memorandum from Cass R. Sunstein, Adm'r, OIRA, to the Heads of Exec. Dep'ts & Agencies, & of Indep. Regulatory Agencies (Feb. 2, 2011), *available at* www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.

In particular, such agencies are encouraged to consider undertaking, on a voluntary basis, retrospective analysis of existing rules."[101]

Five months after Sunstein's memorandum, the Obama Administration took a further step toward bringing the independent agencies under executive direction. Executive Order 13,579, released in July of 2011, was specifically addressed to the independent agencies and urged them to comply with Executive Order 13,563.[102] In fact, Executive Order 13,579 shows a stronger directive quality than any previous order. While careful to acknowledge that nothing in the order should be read to impair the authority granted to independent agencies by law,[103] President Obama nonetheless instructed that, within 120 days of his order, "each independent regulatory agency *should* develop and release to the public a plan" for more effective regulation.[104] "With full respect for the independence of your agencies," President Obama wrote in a July 11, 2011 memorandum accompanying Executive Order 13,579, "I am asking you today to join in [reviewing existing regulations] and produce your own plans to reassess and streamline regulations."[105] It is unclear what legal authority these directives carry, and President Obama is unable to enforce Executive Order 13,579 with the threat of removal. Yet the message to the independent agencies—that the independent agencies are very much a part of the President's team—seems clear.

Finally, even if the independent agencies are formally exempt from OMB/OIRA review, empirical evidence suggests that the executive orders have nonetheless influenced independent-agency practice. The principal substantive innovation of Reagan's Executive Order 12,291 was the requirement that agencies submit to OIRA the estimated costs and benefits of proposed regulations.[106] Though Clinton's order broadened the scope of cost/benefit analysis—additionally requiring that agencies consider potential environmental and economic impacts of regulation, public safety and

101. *Id.* at 6.

102. Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011), *available at* http://www.gpo.gov:80/fdsys/pkg/FR-2011-07-14/pdf/2011-17953.pdf.

103. *Id.* at 41,587.

104. *Id.* (emphasis added).

105. *See* Memorandum from Barack Obama, President of the United States, Regulation & Indep. Regulatory Agencies (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies.

106. *See* Exec. Order No. 12,291, § 3, 3 C.F.R. 127, 128–30 (1981), *reprinted in* 5 U.S.C. § 601 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001).

health, equity, and the distributive impacts of proposed regulations[107]—cost/benefit analysis remains the rule in OIRA review.[108] No executive order has explicitly required the independent agencies to consider the costs and benefits of their proposed rules.[109] Nonetheless, independent agencies have in many cases voluntarily adopted the use of cost/benefit analysis in evaluating regulations. According to OMB's 2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, each of the forty-five regulations promulgated by the SEC since 2000 has contained some consideration of the rule's costs and benefits.[110] The independent agencies have not been uniform in their adoption of cost/benefit analysis: only three of the twelve rules issued by the Federal Reserve System since 2000 has considered costs and benefits,[111] and OMB has expressed skepticism as to whether the cost/benefit analysis performed by those independent agencies that do consider the costs and benefits of their rulemaking is as empirically rigorous as that required by OMB.[112] Still, OMB's data suggests that even if the independent agencies are formally exempted from the executive orders, the val-

107. Exec. Order 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

108. *See, e.g.*, Barkow, *supra* note 88, at 31 ("Every president since Ronald Reagan has used OIRA to require agencies under OIRA's jurisdiction to justify their proposed regulations using cost-benefit analysis.").

109. For an argument that federal regulation would be improved by greater use of cost/benefit analysis by the independent agencies, see Memorandum from Richard L. Revesz & Michael A. Livermore, Inst. for Policy Integrity, N.Y.U. Sch. of Law, New Executive Order Governing Regulatory Review (Feb. 13, 2009), *available at* http://policyintegrity.org/documents/EOComments_000.pdf ("No less than for agencies presided over by the executive, it is important that independent agencies arrive at decisions through rational decisionmaking processes and take full account of the consequences of their actions and inaction.").

110. Office of Mgmt. & Budget, Exec. Office of the President, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 130–31 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

111. *Id.* One hypothesis for why the SEC has been more willing than the Federal Reserve System to embrace cost/benefit analysis in its rulemaking is that the SEC is more dependent on presidential goodwill in presenting its funding requests to Congress than the Federal Reserve System, which raises its own funds by levying member banks. *See* discussion *infra* Part II.C (comparing SEC and Federal Reserve System funding).

112. *Id.* at 31. The report also suggests that exempting the independent agencies from OIRA cost/benefit review serves as a "continued obstacle to transparency, and might also have adverse effects on public policy." *Id.*

ues contained in those orders have nonetheless influenced independent-agency practice.

B. Judicial Review and Presidential Influence

Another reason that removal restrictions do not impose much of an impediment to the President's ability to implement his policy preferences is that, at least since Justice Jackson's observation that the President "heads a political system as well as a legal system,"[113] courts have increasingly acknowledged the nexus between regulatory policy and electoral accountability. With a few notable exceptions,[114] courts have tended to leave the agencies alone. It stands to reason that they would similarly assent to presidential efforts to direct the agencies. Thus while no court has ever considered what "good cause" means in the context of removal restrictions, the courts' deferential standard of review of agency action strongly suggests that a court would show great restraint before ruling that a President had improperly dismissed an independent-agency official.

Some of the most salient cases concerning judicial review of agency policy have arisen after the election of a new President with a new regulatory agenda. For instance, in *Motor Vehicles Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court ruled that the National Highway Traffic Safety Administration's (NHTSA) rescission of seatbelt regulations issued by the agency during the previous presidential administration was arbitrary and capricious as defined by the Administrative Procedure Act.[115] During the Carter Administration, NHTSA issued regulations requiring a certain type of seatbelt to be included in all American-made cars.[116] Less than a month after Reagan's inauguration, Secretary of Transportation Andrew Lewis, citing "changed economic circumstances and . . . the difficulties of the automobile industry,"[117] began the process of rescinding those regulations.

113. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

114. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 128–29, 161 (2000) (rejecting the FDA's interpretation of a statute as giving the FDA the authority to regulate the promotion, labeling, and advertising of cigarettes to youth).

115. *See* Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co. 463 U.S. 29, 46 (1983).

116. *See id.* at 37 (describing Secretary of Transportation Brock Adams's 1977 issuance of a mandatory passive restraint regulation).

117. *See id.* at 38 (citing Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 12,033, 12,033–34 (Feb. 12 1981)).

While the Supreme Court struck down the rescission as arbitrary and capricious, *State Farm* is perhaps most notable for Justice Rehnquist's dissent, which proved influential in pointing the way toward greater judicial deference to presidential policy preferences. According to Rehnquist:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.[118]

In *Chevron v. Natural Resources Defense Council*, another case involving the Reagan Administration's deregulatory agenda and decided the year after *State Farm*, the Court formalized the deference it would show to matters of agency policymaking.[119] In *Chevron*, the Court considered whether more industry-friendly regulations adopted by the Environmental Protection Agency (EPA) after Reagan's inauguration were based on permissible interpretations of the Clean Air Act.[120] This time the Court sided with the Administration in upholding the EPA's interpretation of the term "stationary source" as used in the statute.[121] In the now-familiar *Chevron* two-step guide to judicial review of agency statutory interpretation, the reviewing court asks first whether the statute has already spoken to the question at hand.[122] If so, the statute controls.[123] If, however, the statute is silent or ambiguous with respect to the situation, the court will treat the ambiguity as an implicit delegation from Congress to the agency and defer to the agency's interpretation, so long as the court determines the agency's interpretation to be a reasonable one.[124]

Chevron was a watershed case—one source speculated that it may have become the most-cited case in United States jurispru-

118. *Id.* at 59.

119. *See* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

120. *Id.* at 840 (identifying the question presented as whether the EPA's revised definition of "stationary source" comported with the use of the term in the Clean Air Act Amendments of 1977, 42 U.S.C. § 7502(b)(6)).

121. *Id.* at 866.

122. *Id.* at 842–43.

123. *Id.*

124. *Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

dence.[125] For this Note's purposes, what is most salient about *Chevron* is that the Supreme Court seemed to adopt definitively Rehnquist's point from *State Farm*: substantive questions of administrative policy are for the President *qua* chief administrator, not the courts, to decide. According to Justice Stevens's majority:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[126]

While *Chevron* considered an executive agency's interpretation of a statute, in *Public Citizen v. Burke* the D.C. Circuit concluded that the Archivist of the National Archives and Records Administration—established by statute as an independent agency[127]—was entitled to similar deference in interpreting the agency's organic statute.[128] Indeed, the *Burke* court articulated an even stronger version of judicial deference to executive direction of the administrative state than did *Chevron*. According to Judge Silberman:

> Since the incumbent President, by virtue of Article II's command that he take care that the laws be faithfully executed, quite legitimately guides his subordinates' interpretations of statutes, it seems anomalous for the Judiciary to refuse deference merely on the grounds that it can be shown that the agency's interpretation was one pressed by the President upon reluctant subordinates.[129]

And while not considering an agency interpretation of a statute—making *Chevron* inapplicable—the Supreme Court recently held that judicial review of agency policy did not vary depending on whether the agency was considered an independent or executive agency. In *FCC v. Fox Television Stations, Inc.*, the Court considered a challenge to a revised Federal Communications Commission (FCC) policy.[130] Prior FCC policy was to bring civil fines against networks only for the repetitive use of expletives, but in 2004 the FCC an-

125. STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 247 (6th ed. 2006).

126. *Chevron*, 467 U.S. at 865–66.

127. Public Citizen v. Burke, 843 F.2d 1473, 1475 n.1 (D.C. Cir. 1988).

128. *Id.* at 1477.

129. *Id.* at 1477–78.

130. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 505, 508–10 (2009).

nounced that even a single fleeting use of an expletive could be actionable.[131] After the FCC brought an action against Fox, Fox challenged the FCC's revised policy on a variety of statutory and constitutional grounds.[132] In a five-to-four judgment (with three dissenting opinions), the Court upheld the revised policy as a permissible response to changed political circumstances.[133] Justice Scalia rejected Justice Breyer's argument that in the case of independent agencies a reviewing court should more closely scrutinize changes in agency policy: "[I]t is assuredly not 'applicable law' that rulemaking by independent regulatory agencies is subject to heightened scrutiny. The Administrative Procedure Act, which provides judicial review, makes no distinction between independent and other agencies, neither in its definition of agency nor in the standards for reviewing agency action."[134] Justice Scalia went on: "There is no reason to magnify the separation-of-powers dilemma posed by the Headless Fourth Branch" by adopting different standards of review for independent agencies than used for executive agencies.[135]

Justice Scalia's opinion notes that the FCC revised its policy after Congress (rather than the President) pressured it to do so.[136] Nonetheless, *Fox* and *Chevron* together reflect a very different vision of independent agencies from that which prevailed in the age of *Humphrey's Executor*. Where once the Court viewed independent agencies as repositories of expertise "free to exercise [their] judgment without the leave or hindrance of any other official or any department of the government,"[137] and "wholly disconnected from the executive department,"[138] the modern Court treats the independent agencies as political creatures, adopting policies largely at the behest of the political branches.

Thus, based on the Court's deference to agencies in interpreting statutes and determining agency policy, it seems likely that the Court would similarly defer to the President's decision to remove an independent agency official, so long as the President described his removal decision as at least nominally based on "inefficiency,

131. *Id.* at 508–10.

132. *Id.* at 510–11.

133. *Id.* at 504, 516–17.

134. *Id.* at 525 (citations omitted).

135. *Id.* at 525–26.

136. *Id.* at 523–24 n.4.

137. Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26 (1935).

138. *Id.* at 630.

neglect of duty, or malfeasance in office."[139] And while the Supreme Court has never considered what "inefficiency, neglect of duty, or malfeasance in office" means in the context of restricting the authority of the President, it has nonetheless suggested in a related context that the phrase is susceptible to a wide range of meanings. In the 1986 case *Bowsher v. Synar*, the Court cited separation-of-powers concerns in striking down a statute creating the Office of the Comptroller General.[140] The statute provided that the Comptroller General was to be appointed by the President with the advice and consent of the Senate, but that he could be removed at any time by a joint resolution of Congress for permanent disability, inefficiency, neglect of duty, malfeasance in office, or a felony or conduct involving moral turpitude.[141] Chief Justice Burger, writing for the majority, suggested that the statutory-removal restriction gave Congress "very broad" removal power and could be used by the Congress for "any number of actual or perceived transgressions of the legislative will."[142] In a concurring opinion, Justice Stevens described the Comptroller General as "an agent of the Congress."[143]

Cass Sunstein and Richard Pildes have suggested two readings of *Bowsher*, each of which supports the President's authority to direct the independent agencies. On the stronger reading of the case, "traditional removal constraints still leave the President with considerable *legally permissible* latitude to remove—and hence supervise—independent agency heads."[144] The weaker reading admits that *Bowsher* might not apply in the context of presidential removal, but it recognizes that, "however legally constrained removal authority might be, as a practical matter even supposedly independent officials can still be subject de facto to considerable pressure and oversight."[145] With respect to the latter interpretation, presumably the President, as the single figure at the top of the executive pyramid, could exert far more effective pressure on an independent official than could Congress, a collective body whose members may disagree on what regulatory policies the agency should adopt. Whatever the case, it seems clear that either reading suggests that "for cause"

139. "Inefficiency, neglect of duty, or malfeasance in office" being a common standard in many statutory removal restrictions. *See supra* notes 67–70 and accompanying text.

140. Bowsher v. Synar, 478 U.S. 714, 736 (1986).

141. *Id.* at 727–28.

142. *Id.* at 729.

143. *Id.* at 740–41 (Stevens, J., concurring).

144. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 31 (1995).

145. *Id.*

limitations on the President's removal authority only slightly limit the President's ability to direct the administrative state.

Finally, while not directly related to judicial deference, an additional indication of the degree to which the independent agencies have submitted to increasing presidential authority is the infrequency with which an independent agency disagrees with positions taken by the Solicitor General, the presidential appointee who represents the United States in litigation before the Supreme Court. During the Nixon and Carter Administrations, independent agencies frequently took conflicting positions with the Solicitor General, either by refusing to join in the Solicitor General's briefs to the Court or by filing their own competing briefs.[146] Since the Reagan Presidency, however, there have been few instances of public conflict between the independent agencies and the Solicitor General's office.[147] And on those rare occasions when an agency has attempted to take a position apart from that of the Solicitor General, the Solicitor General's office has fought to suppress the agency's grab at independence. For instance, in January of 1994, the Federal Election Commission (FEC) filed a petition for certiorari before the Supreme Court seeking reversal of a D.C. Circuit decision in a campaign-finance case.[148] The FEC had not asked the Solicitor General for permission to file its petition, and in March of 1994 the Supreme Court invited the Solicitor General to file its own brief addressing whether the FEC had the authority to represent itself before the Supreme Court.[149] The Solicitor General argued that the FEC did not have such authority, and the Supreme Court agreed that only the Solicitor General could argue the issue before the Court.[150] Thus the FEC's attempt to act outside White House supervision only resulted in its litigation authority being stripped. The message to the independent agencies—that the Solicitor General will resist an independent agency's attempts to broaden its litigation authority—has probably served as a warning to other independent agencies considering taking a litigation position without the support of the White House.

Thus not only does the judicial branch increasingly defer to the administrative agencies' discretion in policymaking, but the

146. Devins & Lewis, *supra* note 77, at 494–95.

147. *Id.* at 496.

148. George F. Fraley, III, Note, *Is the Fox Watching the Henhouse?: The Administration's Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L. J. AM. U. 1215, 1219 (1996).

149. *Id.*

150. *Id.* at 1219–20.

agencies themselves are showing less resistance to the positions taken by the White House. Both judicial deference and the agencies' increasing compliance with Executive Branch litigation strategies have served to reinforce the President's influence over the administrative state.

C. Jawboning and Presidential Influence

In a seminal article on the independent agencies' place within the three branches of government, Peter Strauss identified one of the most significant difficulties with evaluating the President's influence on the independent agencies: "[A] basic difficulty in writing about the President's legal authority over the affairs of government lies precisely in the infrequency with which that authority is tested in a legal rather than a political arena."[151] Leaving aside speculation about what "for cause" removal means as a legal matter, the President possesses powerful political clout to bring the independent agencies into line with his policy preferences. Richard Neustadt aptly summarized the President's political influence: "The President of the United States has an extraordinary range of formal powers . . . . [But] despite his 'powers' he does not obtain results by giving orders—or not, at any rate, merely by giving orders . . . . Presidential power is the power to persuade."[152]

The President's ad hoc powers of persuasion are not entirely distinct from the institutional methods discussed above: the better a President is able to persuade others to embrace his preferred policies, the more he will benefit from judicial deference and OIRA review. Still, the President's ad hoc jawboning constitutes an important supplement to his legal authority, and Presidents often find that using informal ex parte contacts is less politically costly than testing the outer limits of their legal authority.[153] This section will consider some examples of the ways in which the President can use the bully pulpit to direct the administrative state.

One strong lever of presidential control of the independent agencies is OMB's role in agency funding. Before 1921, government agencies submitted their annual budget requests directly to

151. Strauss, *supra* note 89, at 580.

152. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 10–11 (The Free Press 1990 ed.) (1960).

153. *See, e.g.*, Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 (1980) ("[T]he President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate.").

Congress.[154] The inefficiency of dealing with each agency piecemeal led Congress to pass the Budget and Accounting Act, which allowed the President to submit a single annual budget that would provide for all of the administrative agencies.[155] Today, most independent agencies submit their budgets to OMB for inclusion in an overall budget request,[156] thereby allowing the President an opportunity to reduce the agency's request if he sees fit.

Presidential control over agency funding can force the agency's chair into the awkward position of testifying before Congress in favor of a budget that reflects the President's preferences more than it does the agency's. The Clinton Administration, for example, never showed much interest in securities regulation, and for much of Clinton's Presidency only two or three SEC Commissioners were in office.[157] Further, OMB did not look kindly on the SEC's initial budget requests, and in 1997 and 1998, Clinton's final budget proposals reduced the SEC's initial requests so as not to provide for any significant increases over the previous years.[158] In testimony before Congress, SEC Chairman Arthur Levitt repeatedly pleaded that the agency's appropriations had failed to keep pace with the rapidly expanding securities markets,[159] but without the support of the White House, his efforts fell on deaf ears.[160] The years of meager appropriations affected the SEC's ability to fulfill its responsibilities: between 1998 and 2000, the SEC lost one-third of its staff,[161] and, more recently, the SEC has been portrayed by media as being "asleep at the switch" in failing to prevent both the dotcom crash and the 2008 credit crisis.[162] Nonetheless, the SEC remains a "strikingly vulnerable political actor,"[163] and often SEC

154. *Id.* at 963.

155. *Id.*

156. Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 253 (2004).

157. *Id.* at 239. The Commission even modified its quorum rules to allow it to conduct business should only one or two Commissioners remain. *Id.*

158. *Id.* at 244–45.

159. *Id.* at 240.

160. *See id.* (describing Levitt's annual testimony before Congress as "an exercise in frustration, or, at best, damage control").

161. *Id.* at 248 (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-302, SEC OPERATIONS: INCREASED WORKLOAD CREATE CHALLENGES 11–13, 25 (2002)).

162. *See, e.g.*, Theo Francis, *SEC's Cox Catches Blame for Financial Crisis*, BLOOMBERG BUS. WK. (Sept. 19, 2008, 12:01 AM), http://www.businessweek.com/bwdaily/dnflash/content/sep2008/db20080918_764469.htm.

163. Seligman, *supra* note 156, at 250.

market-regulation policy more closely reflects the President's priorities than those of the Commissioners.[164]

Unsurprisingly, Presidents have more difficulty controlling those independent agencies that are able to provide for their own budgets. The Board of Governors for the Federal Reserve, (the Fed), for example, obtains its funding by levying assessments on member banks.[165] The Fed's self-funding has been described as the key to its "high level of performance, its professionalism, and its ability to withstand political pressures."[166] Historically, the Fed has not shied away from confrontation with the Executive Branch. Upon his 1979 confirmation as Chairman of the Fed, Paul Volcker began implementing strict monetary policies to control the country's rising inflation.[167] Unemployment soared, and the White House unsuccessfully lobbied the Fed to relax the money supply.[168] Volcker ultimately resigned in 1987, six years before the end of his fourteen-year Board of Governors term.[169]

Yet in light of steadily expanding presidential influence, Volcker's successors have not been nearly as intent on maintaining the Fed's hermetic independence from the White House. Where Volcker refused to visit the White House or to host Reagan at the Federal Reserve, his successor Alan Greenspan visited the White House almost weekly.[170] And throughout the financial crisis and

164. *See, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 602–03 (2010) ("Although Secretary Paulson could not back any directive to the SEC with the threat of Presidential removal, he achieved the desired result. Through Secretary Paulson, the President steered securities regulation.") (citing Amit R. Paley & David S. Hilzenrath, *SEC's Cox Defends Approach*, L.A. TIMES (Dec. 27, 2008), http://articles.latimes.com/2008/dec/27/business/fi-cox27 ("But in publicly acknowledging for the first time that the [short-selling] ban was not productive, Cox said he had been under intense pressure from Treasury Secretary Henry M. Paulson Jr. and Fed Chairman Ben S. Bernanke to take the action and did so reluctantly.")).

165. 12 U.S.C. § 243 (2006).

166. *See, e.g.*, Seligman, *supra* note 156, at 255.

167. Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 547 (2000).

168. *Id.* at 548–49.

169. *See* Robert D. Hershey, Jr., *Volcker Out After 8 Years as Federal Reserve Chief; Reagan Chooses Greenspan*, N.Y. TIMES (June 3, 1987), http://www.nytimes.com/1987/06/03/business/volcker-out-after-8-years-as-federal-reserve-chief-reagan-chooses-greenspan.html. Note that members of the Federal Reserve Board of Governors are appointed to fourteen-year terms. 12 U.S.C. § 241 (2006).

170. Sebastian Mallaby, *The Charm of the Chairman*, WASH. POST (Sept. 23, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/20/AR2007092002060.html (reviewing ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN THE NEW WORLD (2007)).

the subsequent recession, Fed Chair Ben Bernanke worked so closely with Treasury Secretary Timothy Geithner that one critic said the two "cast one shadow."[171] While it is impossible to know the degree to which informal contact between the White House and the Fed has resulted in the Fed's adopting presidential policy preferences, such contacts do suggest that Greenspan and Bernanke have been much more receptive to presidential influence on Federal Reserve policymaking than was Volcker.

Another important means by which the President may exert ad hoc influence over the administrative state is through the appointment of the Chair of independent regulatory commissions. For instance, the President selects the Chair for many independent agencies, including the FTC, the FCC, and the National Labor Relations Board.[172] Even though the statutes creating these agencies restrict the President's authority to remove a commissioner entirely from the relevant agency,[173] the President is generally understood to be free to demote the current Chair from his Chairmanship without having to show cause.[174] As a functional matter, however, the difference might be negligible: often, the demotion of a Chair by a new presidential Administration effectively secures a new appointment to the Commission, as demoted Chairmen frequently resign their posts soon after losing the leadership position.[175] This is more a matter of practice than of law: many statutes give minimal detail

171. Bressman & Thompson, *supra* note 164, at 630. Bernanke worked closely with Geithner's predecessor as well. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1663 (2009) ("[T]he chair of the Fed, Ben Bernanke, acted hand in glove with the Treasury secretary, Henry Paulson, with the latter in the role of lead partner.").

172. *See* Verkuil, *supra* note 153, at 955 n.75.

173. Note again that SEC Commissioners have been determined to be removable only for cause by judicial decision, not by statute. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3182 (2010) (Breyer, J., dissenting); *see supra* text in note 51.

174. *See, e.g.*, 15 U.S.C. § 41 (2006) ("The President shall choose a chairman from the [FTC]'s membership. . . . Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."). Note also that tenure for chairmanship may be significantly shorter than tenure as an agency commissioner. For instance, by statute, the Chairman of the Federal Reserve serves as chair for only 4 years, as compared to the 14-year term for all other members of the Board of Governors. 12 U.S.C. §§ 241–242 (2006). Likewise, the Commissioners on the FEC serve six-year terms, but the statute prohibits any Commissioner from serving as chair for more than one year. 2 U.S.C. § 437c(a)(2)(A), (5) (2006).

175. Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DEPAUL L. REV. 333, 338 (2010).

about the role of the Chair in relation to the agency as a whole,[176] and chairmanship may carry little extra formal power.[177] Still, informal powers possessed by the Chair often include supervisory authority over staff; agenda setting; control over agency finances; and, perhaps most importantly, the ability to represent the agency in public.[178] Frequent appearances with the President strongly influence how the public evaluates the agency. For instance, during his tenure as Chairman of the FCC, Mark Fowler met frequently with President Reagan to discuss telecommunications policy.[179] Despite Fowler's relatively moderate voting record, a survey of experts ranked him the second most conservative Commissioner ever to serve on the FCC.[180]

In addition to the above-discussed methods, before her appointment to the Supreme Court then-Dean Kagan identified two further ad hoc methods by which the President is able to influence the administrative agencies. First, Kagan referred to President Clinton's use of formal directives to influence agency policy. As one example, Clinton announced at a commencement address that he would use his executive authority as President to direct the Secretary of Labor to issue a rule allowing states to offer paid leave to new mothers and fathers.[181] According to Kagan, Clinton issued 107 similar directives to agency heads during his tenure in office, encouraging them to implement his policy initiatives on topics ranging from carbon dioxide emissions to food safety laws to hate crimes in schools and colleges.[182]

Kagan also described Clinton's practice of appropriating agency action. Clinton made extensive use of the bully pulpit to claim as his own countless agency reports, rulings, regulations, waivers, and even lawsuits initiated by the bureaucracy.[183] Even when these appropriations came entirely after the fact, according to Kagan, the message they delivered was clear: these were Clinton's agencies, and Clinton alone was entitled to claim credit for agency successes.[184] To return to the Secretary of Labor example, even before the comment period for the regulation ended, Clinton was speaking of the regulation as essentially consummated, and when

176. Breger & Edles, *supra* note 83, at 1172.
177. Ho, *supra* note 176, at 338.
178. *Id.* at 360.
179. *Id.*
180. *Id.*
181. Kagan, *supra* note 73, at 2284.
182. *Id.* at 2294–95.
183. *Id.* at 2299.
184. *Id.*

the final regulation was promulgated Clinton announced it in his weekly radio address.[185]

President Obama has made use of both directives and appropriation in managing the administrative state. For instance, speaking at a public event in September 2010, President Obama conceded that passing pro-union "card check" legislation through Congress would be politically infeasible, but that he was nonetheless committed to using the administrative process to advance the interests of organized labor.[186] Similarly, in a June 2010 memorandum from the White House Press Secretary addressed to the heads of executive and independent agencies, President Obama directed his Secretary of Commerce to collaborate with the FCC to form a plan to auction off 500 megahertz of wireless broadband Internet access to the public.[187] Later, in a February 2011 address at Northern Michigan University, President Obama announced that the Administration would begin selling access to the broadband spectrum to private companies.[188] Despite the FCC's formal independence, President Obama claimed its regulation as his own.

It is important to note that these methods of extralegal ad hoc control are much more controversial than OIRA review or judicial deference. In certain narrow circumstances, ad hoc presidential lobbying may be unlawful: in the context of formal adjudications, the Administrative Procedure Act (APA) prohibits ex parte communications from non-interested persons,[189] and the Ninth Circuit has held that off-the-record communications between the White House

185. *Id.* at 2284.

186. Sean Higgins, *Obama: Pro-Union 'Card Check' Dead, So We'll Use Regulation*, CAPITAL HILL: INVESTOR'S BUS. DAILY'S POL. & MARKETS BLOG (Sept. 13, 2010, 9:08 PM), http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/2051-obama-pro-union-card-check-dead-so-well-use-regulation ("Frankly, we don't have 60 votes in the Senate. So the opportunity to actually get [card-check legislation] passed right now is not real high. What we've done instead is try to do as much as we can administratively to make sure that it's easier for unions to operate and that they're not being placed at an unfair disadvantage.") (statement of President Barack Obama).

187. Memorandum for the Heads of Executive Departments and Agencies, Unleashing the Wireless Broadband Revolution, 75 Fed. Reg. 38387 (June 28, 2010), *available at* http://www.gpo.gov:80/fdsys/pkg/FR-2010-07-01/pdf/2010-16271.pdf.

188. Press Release, Office of the Press Sec'y, White House, Remarks by the President on the Nat'l Wireless Initiative in Marquette, Mich. (Feb. 10, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/10/remarks-president-national-wireless-initiative-marquette-michigan.

189. 5 U.S.C. § 557 (2006). Note that Supreme Court precedent has narrowly defined "formal adjudication." *See* BREYER ET AL., *supra* note 125, at 492.

and an agency engaged in formal adjudication would run afoul of the APA.[190] The legality of informal presidential jawboning in the context of everyday agency policymaking, however, is an open question, even as jawboning increasingly becomes a part of the way governmental business is done. For instance, Vice President Cheney frequently circumvented traditional chains of command and reached down the administrative ladder to make clear the Bush Administration's policy preferences.[191] While effective, Cheney's practices prompted strong criticism for undermining governmental transparency.[192] Nonetheless, despite its controversial nature, ad hoc jawboning represents one of the primary means by which the President brings the independent agencies into line with his policy preferences. To whatever extent removal restrictions might limit the President's authority over the independent agencies, it seems that his extralegal tools of influence are far more powerful.

III.
RESISTANCE TO PRESIDENTIAL CONTROL

While the President exerts strong influence on the independent agencies, directing the administrative state is a formidable task, and the President's powers to use the agencies to implement his policy preferences are limited. However, statutory removal restrictions produce more controversy among legal scholars than restraint on the President's influence. At least since the rise of party polarization, the confirmation process has served as the primary impediment to the President's ability to staff the administrative agencies.

From a normative perspective, confirmation politics are bad for government. High-level policymaking positions are too often left empty or filled by interim appointments, and the resulting un-

190. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1550 (9th Cir. 1993).

191. *See, e.g.*, Jo Becker & Barton Gellman, *Leaving No Tracks,* WASH. POST (June 27, 2007), http://blog.washingtonpost.com/cheney/chapters/leaving_no_tracks/ (describing Cheney's unsolicited phone call to the nineteenth-ranking Interior Department official to request her assistance in mediating a conflict between Oregon farmers and environmental advocates).

192. *See, e.g.*, *White House Climate Change Policy—Delay, Delete and Deny*, OMB WATCH (July 22, 2008), http://www.ombwatch.org/node/3741 ("Evidence of alterations [of an EPA report] by the vice president's office is indicative of a larger pattern of high-level administration officials exercising influence over expert recommendations by withholding information. . . . These incidents indicate a behavior of censorship targeting the scientific community and the government's career staff.").

derstaffed bureaucracy can lead to drastic consequences. What is particularly surprising is that confirmation politics are also a less-than-optimal means of resisting the President's influence. In fact, a deadlocked Congress moves the locus of policymaking away from the legislative branch and towards the agencies, thereby further centralizing presidential control. Extended battles over independent-agency appointments, it seems, are bad policy and bad politics.

This Part examines in turn the rise of modern contentious confirmation politics, the consequences of these politics, and the means by which they actually increase the President's control over the agencies

A. Confirmation Politics

As the administrative agencies have grown more powerful, the confirmation process has grown more contentious. In a recent empirical survey, Neal Devins and David Lewis studied independent-agency appointments from the Harding Presidency to the George W. Bush Administration, finding that every President except one was able to secure a majority for his party on each of the independent regulatory commissions,[193] usually within the first year after inauguration.[194] However, it is taking Presidents longer and longer to make the necessary appointments to secure a party majority on the independent commissions,[195] and opposition-party Senators are making greater use of delay tactics—hearings, floor votes, filibusters, and holds—to hinder the President's appointments.[196]

According to Devins and Lewis, the greater delay between a President's nomination and the Senate's confirmation corresponds with the rise in party polarization since Reagan's Presidency.[197] For

193. Devins & Lewis, *supra* note 77, at 469. The one exception was President Carter, who failed to appoint a majority to the Nuclear Regulatory Commission. *Id.* at 469 n.56. Note that Devins and Lewis excluded the Board of Governors of the Federal Reserve from their survey; neither the Kennedy nor the Nixon administrations were able to appoint a majority to the Board. *Id.*

194. *Id.* (noting that on average, Presidents were able to appoint party majorities on the independent regulatory commissions within nine or ten months of coming into office).

195. *Id.* at 473.

196. *Id.* at 487–88 ("'Nominees,' as an official of both Bush administrations put it, 'are now treated like pieces of legislation, facing the full array of parliamentary weapons such as delayed hearings or floor votes, filibusters and so-called 'holds.'").

197. Devins & Lewis, *supra* note 78, at 461–62 ("[W]e see the Reagan presidency as transformative—separating a period of modest party polarization from a period of ever-increasing polarization.").

instance, from the Coolidge Presidency to the Reagan Presidency, the average lag between a President's recommending a nominee to the Senate and the nominee's confirmation hovered around two months.[198] Since Reagan, the average delay has increased, topping out at six months of Senate-imposed delay during the George W. Bush Administration.[199] And as Devins and Lewis point out, these figures probably underestimate the actual delaying effect Senate confirmation has on presidential nominations, since a President who anticipates a confirmation battle with a hostile Senate will spend longer vetting potential nominees to make sure the ultimate appointment is politically feasible.[200] Thus a President faced with an agency official with whom he disagrees may prefer to live with the incumbent official (or otherwise diminish her influence[201]) rather than to spend the political capital required to dismiss the official[202] and make another appointment.

Modern confirmation politics have become highly controversial. The *New York Times* and *Washington Post* have repeatedly criticized the delayed confirmation of presidential nominees,[203] and Judge Kavanaugh of the D.C. Circuit has noted that "using the confirmation process as a backdoor way of impeding the President's direction and supervision of the executive branch—of gumming up the works—is constitutionally irresponsible and makes our government function less efficiently and effectively."[204] Various pieces of reform legislation have been proposed: in July of 2010, Senators Ron Wyden (D-Oregon), Chuck Grassley (R-Iowa), and Claire Mc-

198. *Id.* at 474 Figure 4.

199. *Id.*

200. *Id.*

201. *See supra* notes 172–80 and accompanying text (regarding the President's influence over agencies through the appointment and demotion of the Chair of independent regulatory commissions).

202. The political consequences of dismissing a high-ranking official—even one who serves at the pleasure of the President—should not be understated. For instance, George W. Bush's simultaneous firings of seven U.S. Attorneys was widely considered a public-relations disaster for his Administration. Even though Bush acted entirely within his legal authority, U.S. Attorneys were traditionally removed only for personal or professional misconduct and not for their political allegiances. *See generally* James Eisenstein, *The U.S. Attorney Firings of 2006: Main Justice's Centralization Efforts in Historical Context*, 31 SEATTLE U. L. REV. 219, 259–63 (2008).

203. *See, e.g.*, Editorial, *Call It Obstructionism*, N.Y. TIMES (June 27, 2009), http://www.nytimes.com/2009/06/28/opinion/28sun2.html; Editorial, *The Senate's Broken Confirmation Process*, WASH. POST (June 10, 2011), http://www.washingtonpost.com/opinions/the-senates-broken-confirmation-process/2011/06/10/AGIdzKPH_story.html.

204. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1464 (2008).

Caskill (D-Missouri) introduced the Secret Holds Elimination Act to curtail one common delaying tactic,[205] and in April of 2011 the Senate Homeland Security and Intergovernmental Affairs Committee approved proposed legislation to decrease the number of executive positions requiring Senate confirmation.[206] Nonetheless it remains to be seen what, if any, effect these proposals will have on trends in modern confirmation politics, and all indications suggest that the Senate will continue to resist presidential appointments.

B. The Consequences of Confirmation Politics

The most immediate consequence of confirmation politics is an understaffed government. As of 2008, the administrative state contained 1141 Senate-confirmed positions and 314 non-Senate-confirmed positions, all to be appointed by the President.[207] Unsurprisingly, many of these positions go unfilled. According to a recent empirical study, at any given moment, one-quarter of Senate-confirmed positions are either empty or filled by acting officials.[208] In some cases vacancies are deliberate: for instance, Reagan delayed making appointments to agencies whose policies he disliked,[209] and Presidents tend to fill agency positions in order of their regulatory priorities.[210] However, Presidents from both sides of the aisle have criticized the Senate for impeding their appointments. George W. Bush called the confirmation process "a never ending political game, where everyone loses,"[211] and President Obama has complained publicly about the Senate's dragging its feet in confirming

205. *See* Alexandra Arney, *The Secret Holds Elimination Act*, 48 HARV. J. ON LEGIS. 271, 272 (2011).

206. *See* Carl Hulse, *Lawmakers Seek to Unclog Road to Confirmation*, N.Y. TIMES (Apr. 24, 2011), http://www.nytimes.com/2011/04/25/us/politics/25nominate.html.

207. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 926 (2009).

208. *Id.* at 921.

209. *Id.* at 944.

210. *Id.* at 969 ("Republican presidents may work to avoid long vacancies in the DOD, Treasury, and Departments of Commerce and Energy, for instance, because those agencies are considered to be more conservative. By contrast, Democratic presidents may pay more attention to the Departments of Education, Health and Human Services, and Labor and the EPA, which are more liberal agencies.").

211. Press Release, Office of the Press Sec'y, White House, President Bush Discusses Pending Presidential Nominations, Urges Senate Confirmation (Feb. 7, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080207-8.html.

his nominees.[212] And while the President is sometimes able to circumvent Senate nomination through the use of recess appointments, the use of recess appointments has always been controversial, and the Senate can always choose not to recess in order to block the nominee.[213]

There may be benefits to vacancies within the administrative state. Some have argued that frequent turnover in agency leadership positions fosters creative solutions to complex policy problems,[214] or that promoting long-term career servants to serve as interim officials will produce better policy outcomes than trusting regulation to political appointees who may be inexperienced in the regulated subject area.[215]

Yet the countervailing evidence is overwhelming, and examples abound of administrative-agency vacancies producing disastrous consequences. For instance, the National Commission on Terrorist Attacks Upon the United States, better known as the 9/11 Commission, cited turnover in agency positions and the resulting inexperience of intelligence-agency administrators as one of many factors leading to the government's failure to prevent the terrorist attacks of September 11, 2001.[216] The Federal Emergency Management

212. Press Release, Office of the Press Sec'y, White House, Remarks by the President at the Senate Democratic Policy Comm. Issues Conference (Feb. 3, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-senate-democratic-policy-committee-issues-conference (responding to a question from Senator Patrick Leahy concerning delayed confirmations of judicial nominees, President Obama answered "Look, it's not just judges, unfortunately, Pat, it's also all our federal appointees. We've got a huge backlog of folks who are unanimously viewed as well qualified, nobody has a specific objection to them, but end up having a hold on them because of some completely unrelated piece of business.").

213. O'Connell, *supra* note 207, at 930 n.84. One recent controversy came over the appointment of James Cordray to lead the Consumer Financial Protection Bureau. In order to prevent President Obama from using a recess appointment to name Cordray to the position, Congress refused to recess in December of 2011, instead holding *pro forma* sessions every third day. These sessions typically lasted only a minute or two, and were presided over by a single congressman; no official business was conducted. Despite the Senate's claim to remain in session, President Obama appointed Cordray on January 4, 2012. James Kennedy, *Obama's NLRB Recess Appointments are Constitutional*, JURIST (Feb. 11, 2012), http://jurist.org/sidebar/2012/02/james-kennedy-recess-appointments.php. For a defense of the constitutionality of President Obama's recess appointments, including that of Cordray, see Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. TIMES (Jan. 5, 2012), http://www.nytimes.com/2012/01/06/opinion/games-and-gimmicks-in-the-senate.html.

214. O'Connell, *supra* note 207, at 947.

215. *Id.* at 950.

216. *Id.* at 938–39.

Agency (FEMA) is another example. Only one of eight Senate-confirmed FEMA positions had been filled in September of 1989 when Hurricane Hugo struck South Carolina and killed eighty-two people,[217] and a year before Hurricane Katrina made landfall in 2005, more than one-third of FEMA's high-ranking policy positions were vacant.[218] More recently, the number of empty or interim-filled positions at a number of financial regulatory agencies, as well as the ensuing leadership vacuum, have hobbled implementation of the Dodd-Frank reforms.[219] According to one commentator:

> If you told people on Wall Street that every four years or eight years, you were going to lop off the top of a Fortune 500 company and say the company would operate normally, you'd be called crazy. There is no question that [understaffing] matters. Turnover and vacancies in politically appointed positions hurts performance.[220]

One can only speculate as to the role unfilled leadership positions have played in these and other regulatory failures. Still, the fact that understaffed agencies have been implicated in the biggest natural-security and environmental disasters since the rise of the administrative state should certainly be cause for concern.

C. The Ineffectiveness of Confirmation Politics

Political polarization has thus transformed Senate confirmation into the chief impediment to presidential control of the administrative state, and the concomitant understaffing can produce deleterious results. The more surprising result of political politicization, however, is that, at the same time that it frustrates the President's ability to staff the agencies with people of his choosing, it might also centralize the President's control over the administrative state. After describing the effects of polarization on the increasingly time-consuming appointments process, Devins and Lewis offer a

217. *Id.* at 939.

218. *Id.* at 939–40.

219. *See, e.g.*, Binyamin Appelbaum, *Uncertain Leadership Strains Financial Overhaul*, N.Y. TIMES (May 12, 2011), http://www.nytimes.com/2011/05/13/business/economy/13bank.html. One critic observed that interim appointments "have roughly the same authority as substitute high school teachers." *See* Jesse Eisinger, *At a Time of Needed Financial Overhaul, a Leadership Vacuum*, DEALBOOK (May 18, 2011), http://dealbook.nytimes.com/2011/05/18/at-a-time-of-needed-financial-overhaul-a-leadership-vacuum/.

220. *See* O'Connell, *supra* note 207, at 940 (citing Dan Eggen & Christopher Lee, *Late in the Term, an Exodus of Senior Officials: Scores of High-Level Political Positions Are Vacant or Are Being Filled By Temporary Appointees*, WASH. POST, May 28, 2008, at A11 (quoting political scientist David Lewis)).

second conclusion: once the President is able to secure a majority of commissioners from his party on an independent commission (which often happens within the first year of office), party polarization gives the President greater control over the independent agencies, making them more likely to implement policies of the President's choosing.[221]

Divided government has become the norm in Washington.[222] "[F]rom 1969 to 2000, government was divided for twenty-six of thirty-two years, or eighty-one percent of the time."[223] During periods of divided government, Democrats and Republicans are less able to agree on legislation,[224] and the absence of a block of centrist legislators willing to cross party lines makes competition between the executive and legislative branches more intense.[225] Hence, with a deadlocked Congress, the locus of lawmaking moves away from Congress and toward the executive and the independent administrative agencies.[226] The numbers bear this out: in 2007, Congress enacted 138 public laws; by contrast, federal agencies finalized 2926 final rules, of which sixty-one were labeled as major regulations, defined as having an effect of over $100 million on the economy.[227]

With so much policymaking being done at the administrative level, Presidents since Reagan have placed greater emphasis on political ideology when making agency appointments.[228] Presidents also increasingly have taken advantage of non-legislative policymaking tools—executive orders, directives, and appropriation, among others—to bring the agencies in line with their policy preferences.[229] In addition to circumventing Congress on the front end, unilateral presidential action has the advantage of seldom being challenged by Congress after the fact. Between 1973 and 1998, Presidents issued nearly one thousand executive orders.[230] Only thirty-seven of these orders were challenged by Congress, and only three

221. Devins & Lewis, *supra* note 77, at 462.

222. *Id.* at 486.

223. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2331 (2006).

224. *See, e.g.*, Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 71 (2007).

225. Levinson & Pildes, *supra* note 223, at 2337–38.

226. Devins & Lewis, *supra* note 77, at 485.

227. O'Connell, *supra* note 207, at 936.

228. Devins & Lewis, *supra* note 77, at 492.

229. *Id.* at 486; *see also* Kagan, *supra* note 73, at 2299–300.

230. Devins, *supra* note 77, at 67–68.

resulted in legislation.[231] James F. Blumstein aptly summarized the degree to which the President has taken charge of the regulatory process: "[a]fter [nearly decades] of political and intellectual *Sturm und Drang* on the issue of centralized presidential regulatory review . . . it appears that we are all (or nearly all) Unitarians now."[232]

The practices of the Obama Administration support Devins and Lewis's hypothesis that congressional obstructionism leads to unilateral presidential action. Indeed, President Obama has often circumvented the confirmation process by creating a number of non-Senate-confirmed high-level administrative positions,[233] known colloquially as "czars."[234] The practice has received criticism from both sides of the aisle for upsetting the constitutional balance of

231. *Id.* at 68.

232. James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 851–52 (2001) (citations omitted). Of course, Blumstein refers generally to the "unitary executive" model of the Presidency, which emphasizes the President's strong influence over the federal government. *See, e.g.*, Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 251 (2010); Pierce, *supra* note 72.

233. In some instances, President Obama created these positions via executive order. *See, e.g.*, Exec. Order No. 13,507, 74 Fed. Reg. 17071 (Apr. 8, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-04-13/pdf/E9-8572.pdf (creating the White House Office of Health Reform, to be headed by a non-Senate-confirmed Director charged with "provid[ing] leadership for and [coordinating] the development of the Administration's policy agenda across executive departments and agencies concerning the provision of high-quality, affordable, and accessible health care . . . ."). Other "czars" were named as ad hoc special advisors to existing advisory bodies. *See, e.g.*, Jesse Lee, *Van Jones to CEQ,* WHITE HOUSE BLOG (Mar. 10, 2009, 12:37 PM), http://www.whitehouse.gov/blog/09/03/10/Van-Jones-to-CEQ/; Scott Wilson & Garance Franke-Ruta, *White House Adviser Van Jones Resigns Amid Controversy Over Past Activism*, WASH. POST (Sept. 6, 2009), http://voices.washingtonpost.com/44/2009/09/06/van_jones_resigns.html (noting that because "Green Jobs Czar" Van Jones was not confirmed by the Senate, he did not undergo the same degree of vetting usually undertaken with Senate nominees). Or consider the case of Elizabeth Warren: Warren initially proposed the Consumer Financial Protection Bureau, lobbied hard for its creation, and was a natural choice to serve as its first Director, but she was seen as politically risky. Rather than name Warren as the Director for the entire five-year term, President Obama nominated her to oversee the Bureau until a Senate-confirmed Director could be named, setting mid-2011 as his target. *See* Sewell Chan, *Warren to Unofficially Lead Consumer Agency*, N.Y. TIMES (Sep. 15, 2010), http://www.nytimes.com/2010/09/16/business/16consumer.html.

234. Noelle Straub, *Sen. Byrd Questions Obama's Use of Policy 'Czars,'* N.Y. TIMES (Feb. 25, 2009), http://www.nytimes.com/gwire/2009/02/25/25greenwire-byrd-questions-obamas-use-of-policy-czars-9865.html.

power between the branches,[235] and in February of 2011 the Republican-controlled House voted to strip the salaries of several of President Obama's non-Senate-confirmed positions.[236] President Obama has reaffirmed his commitment to his unofficial policy advisors, however. In his signing statement for the 2011 appropriations bill, which purported to strip funding for several of President Obama's czars, President Obama cited "well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority," and he stated his intention to construe the bill "not to abrogate these Presidential prerogatives."[237] While the debate over President Obama's czars continues, so long as the confirmation process impedes the President's authority to implement his policy preferences, it seems likely that future Presidents will find other ways to avoid it.

Thus the strange consequence of our current confirmation politics is that while existing agency positions are left empty, the Obama Administration has created a number of new informal advisory positions in order to go about the business of government.[238] Congress has leaned so heavily on its advice-and-consent power[239] as a method of resisting expanding presidential influence that, in many cases, the President simply circumvents Capitol Hill. There is nothing wrong, and much right, with the President's seeking advice; indeed, the Constitution explicitly authorizes the President to ask for written opinions from his subordinates.[240] Nor are our principles of the separation of powers offended by the President's efforts to coordinate independent-agency regulation in order to implement his preferred policy initiatives.

But appointing informal advisors on an ad hoc basis does not address the more endemic problems with the administrative state as it exists today. The danger of modern confirmation politics is that

235. *Id.*; *see also* Manu Raju, *Democrats Join GOP Czar Wars*, POLITICO (Sept. 17, 2009, 5:05 AM), http://www.politico.com/news/stories/0909/27265.html.

236. Evan Lehmann, Lisa Friedman, Lauren Morello & Saquib Rahim, *House Republicans Fire White House Climate Advisers as Frenzied Budget Debate Continues*, N.Y. TIMES (Feb. 18, 2011), http://www.nytimes.com/cwire/2011/02/18/18climatewire-house-republicans-fire-white-house-climate-a-41808.html.

237. Press Release, Office of the Press Sec'y, White House, Statement by the President on H.R. 1473 (Apr. 15, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473.

238. *See supra* notes 233–34 and accompanying text (discussing President Obama's various czar appointments).

239. U.S. CONST. art. II § 2, cl. 2.

240. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices . . . .").

understaffed administrative agencies cannot adequately police their areas of expertise. For every recent national crisis—9/11, Hurricane Katrina, the financial crisis of 2008—there has been an understaffed regulator struggling to respond.[241] Vacancies in the administrative agencies, especially when combined with czar-type presidential appointments operating without a clear legislative grant of authority, produce regulatory turf wars, muddled chains of command, and a general diffusion of accountability. There is nothing wrong with the President's drawing on the expertise of informal, czar-type policy advisors. There is something wrong with understaffed agencies being unable to discharge their statutory duties.

CONCLUSION

In 1937, President Roosevelt's Brownlow Committee on Administrative Management derisively referred to the independent agencies as "the fourth branch" and criticized the manner in which the independent agencies intruded on the President's direction of the burgeoning administrative state.[242] Despite the Supreme Court's recent reassertion of the President's authority over the independent agencies in *Free Enterprise Fund*, the Brownlow Committee's concerns seem outlandish today. Today, independent agencies seldom disregard the President's input, and when they do it is at their own peril.

The *Free Enterprise Fund* opinion thus misses the mark: removal restrictions bear little consequence to the President's direction of the administrative state. Rather, the primary restraint on the President's influence over the agencies is the Senate's power to advise and consent to the President's appointees. Senate obstructionism makes little sense as a political matter, as the President possesses ample tools to implement his policies at the administrative level. It makes even less sense as a policy matter, as prolonged confirmation battles only sap the energy of a government that could better use its time by governing. The President bears the costs of ineffective regulation at the ballot box. The American public pays for it every day.

241. *See supra* notes 216–20 and accompanying text.

242. *See* Ginsburg & Menashi, *supra* note 232, at 266.

PUBLIC OFFICIALS, PUBLIC DUTIES, PUBLIC FORA: CRAFTING AN EXCEPTION TO THE ALL-PARTY CONSENT REQUIREMENT

*BY JAKE TRACER**

INTRODUCTION

Anthony Graber, a Maryland Air National Guard staff sergeant, was riding his Honda motorcycle, speeding down I-95 near Balti-

* New York University School of Law, J.D., 2012. Many thanks to Erin Murphy, whose guidance shaped this Note, and to Rachel Barkow, who first alerted me to the topic. Thank you as well to Lina Bensman, Greta Fails, Felicity Kohn, and Rosemary Morgan, whose support—and peer pressure—kept me moving forward.

more at 80 miles per hour.[1] Chris Drew, an artist and free speech advocate, was offering his wares outside a Macy's on State Street in Chicago, where it is illegal for street vendors to sell their goods.[2] Robert Hammonds, an aspiring filmmaker, was yelling at what he thought was a drunk driver—but turned out to be a police officer—who had cut him off late one Saturday night in Miami.[3]

All three were arrested and charged with essentially the same crime: wiretapping. Graber, Drew, and Hammonds were all recording their experiences, and Maryland, Illinois, and Florida are three of twelve states that require all parties to a conversation to consent before that conversation can be recorded.[4] Because the police officers who stopped them never consented, the three were charged with felonies.[5] Drew and Hammonds were found out immediately; their recording equipment was discovered at the scene.[6] Graber's, however, was not. The circumstances that led to Graber being charged, as well as the court decision that subsequently dismissed those charges, highlight one of the predominant tensions in the wiretapping debate: the tradeoff between the free-speech right of citizens to record public activity, and law enforcement officials' rights to privacy and autonomy.

1. *See* Annys Shin, *From YouTube to Your Local Court*, WASH. POST, June 16, 2010, at A1.

2. *See* Cheryl Corley, *Often, You Can Film Cops; Just Don't Record Them*, N.P.R. (Sept. 1, 2010), http://www.npr.org/templates/story/story.php?storyId=129553748.

3. *See* Tim Elfrink, *Cops vs. Cameras: Filming Cops Illegal*, MIAMI NEW TIMES (Jan. 27, 2011), http://www.miaminewtimes.com/2011-01-27/news/cops-vs-cameras-filming-cops-illegal/.

4. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (LexisNexis 2011); 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2011); FLA. STAT. § 934.03 (2011). The other nine states are California, Connecticut, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. *See* CAL. PENAL CODE §§ 631–32 (West 2012); CONN. GEN. STAT. § 53a-189 (2011); MASS. GEN. LAWS ch. 272, § 99 (2011); MICH. COMP. LAWS § 750.539c (2011); MONT. CODE ANN. § 45-8-213 (2011); NEV. REV. STAT. § 200.620 (2011); N.H. REV. STAT. ANN. § 570-A:2 (2011); 18 PA. CONS. STAT. ANN. § 5703 (West 2011); WASH. REV. CODE ANN. § 9.73.030(1)(b) (West 2010).

5. The maximum sentence for violating Maryland's wiretapping statute is five years. *See* MD. CODE ANN. CTS. & JUD. PROC. § 10-402(b) (West 2011). In Illinois, the maximum sentence is fifteen years for a first-time offense. *See* 720 ILL. COMP. STAT. 5/14-4(b) (2011) (classifying the recording of a police officer as a Class 1 felony); 730 ILL. COMP. STAT. 5/5-4.5-30(a) (assigning a sentence of four to fifteen years for Class 1 felonies). In Florida, the maximum sentence is five years. *See* FLA. STAT. ANN. § 934.03(4)(a) (West Supp. 2011) (classifying the offense as a third-degree felony); FLA. STAT. ANN. § 775.082(3)(d) (West 2010) (assigning a maximum sentence of five years for third-degree felonies).

6. *See* Corley, *supra* note 2; Elfrink, *supra* note 3.

Scholars and courts have argued both sides. Those favoring a citizen's right to record police officers have noted that such a right would: (1) check the authority of the police to wield the state's power, especially since police can frequently undertake actions (like wiretapping) that would be illegal for citizens;[7] (2) deter potential misconduct of the particular officers being recorded;[8] (3) publicize misconduct when it does occur, thereby deterring misconduct generally;[9] and (4) foster the search for truth and exculpate the innocent.[10]

Conversely, critics of a broad right to record police activity have noted that such a right would: (1) ignore that police officers are individuals whose privacy can be invaded;[11] (2) potentially deter police conduct that should be encouraged;[12] and (3) erroneously assume that citizen recordings will always help the fact-finding process arrive at the correct conclusion.[13]

7. *See* Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers' Power*, 117 YALE L.J. 1549, 1551 (2008) ("Police officers are permitted to commit actions that would be illegal if committed by private citizens, and some officers abuse that permission."(footnotes omitted)).

8. *See id.* at 1553 ("Where citizens are permitted to surreptitiously record the police, officers have incentives to be on their best behavior at all times, not just when their own recorders are on."); Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1003 (2009) ("The threat of surreptitious citizen recordings of police interactions further deters police misconduct." (footnotes omitted)).

9. *See* Mishra, *supra* note 7, at 1554 ("Recording devices can capture police officers' misconduct in order to publicize it.").

10. *See* Kirk v. State, 526 So.2d 223, 227 (La. 1988) ("There is no apparent governmental interest which is furthered by the classification which permits prosecutors to obtain and use this type of superior evidence that criminal defendants are prohibited from obtaining."); Skehill, *supra* note 8, at 1004 ("[C]itizen recordings could provide police departments with documented instances of police misconduct, which could aid in police training, making police departments less susceptible to Section 1983 lawsuits.").

11. *See* Mishra, *supra* note 7, at 1555 ("[S]tates should explicitly permit citizens to record police communications *other than* those uttered with the reasonable expectation that they would not be recorded." (emphasis added)); Shekill, *supra* note 8, at 1006 ("Without a doubt, off-duty police officers should enjoy privacy rights equal to those afforded regular citizens.").

12. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 357 (2011) (noting that some police officers do not want to be recorded because of concerns that making their identities more widely known will "put them at risk of retaliation").

13. This point is particularly important to remember as video evidence inevitably proliferates. While video evidence can be thought of as the ultimate smoking gun, its persuasive power belies the fact that, like all evidence, video must be interpreted to have meaning. Even the Supreme Court has struggled to recognize this

Social culture in the 21st century encourages the expansive sharing of public life, and advances in technology make it ever easier to distribute any information shared with the public at large. These dynamics inevitably create tension between citizens who want to record police activity and police officers who do not want such recordings to be created or distributed.[14] That tension is bound to emerge with increasing frequency until it is resolved. Even though the charges against Anthony Graber were eventually dismissed, his experiences reveal how seemingly innocuous acts can now potentially run afoul of wiretapping laws that require all parties to a conversation to consent to its recording.

Graber was pulled over for speeding on March 5, 2010, but the wiretapping charges against him were not filed until April 7.[15] The delay was caused by the fact that the officer who stopped Graber did not know the interaction had been recorded by a small camera mounted on Graber's motorcycle helmet.[16] On March 10, Graber posted the footage to YouTube, where the police eventually discovered it.[17] The first three minutes of the video are surprising in how unimportant they seem: The driver's-eye view shows the red motorcycle popping a wheelie, hitting 125 miles per hour on the speedometer, and changing lanes constantly while weaving between cars. At one point, the motorcycle approaches a marked police car and slows down. It then speeds up again, to about 80 miles per hour, and veers right onto an exit ramp. Then, around the three-minute mark, the motorcycle stops as an unmarked grey sedan pulls up alongside it. The driver of the sedan – wearing jeans and a grey pullover sweater – gets out of the car, pulls a gun out from its hol-

feature of video evidence. *See* Scott v. Harris, 550 U.S. 372, 389–90 (2007) (Stevens, J., dissenting) (arriving at exactly the opposite conclusion as the rest of the Court when reviewing video evidence that the majority held to be overwhelmingly clear).

14. *See* Joshua Brustein, *Stop, Frisk, Record*, N.Y. TIMES, June 8, 2012, at MB4, *available at* http://www.nytimes.com/2012/06/10/nyregion/a-new-tool-to-chronicle-police-stops.html (discussing the New York Police Department's displeasure at the release of a smart phone app developed by the New York Civil Liberties Union that encourages users to use their cell phones to record police stops and automatically upload the videos to the NYCLU).

15. *See* State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *4–5 (Md. Cir. Ct. Sept. 27, 2010).

16. *See* Shin, *supra* note 1.

17. *See id*; Motorcycle Traffic Violation – Cop Pulls Out Gun, YOUTUBE (March 10, 2010), http://www.youtube.com/watch?v=BHjjF55M8JQ [hereinafter GRABER VIDEO]; *see also* Carlos Miller, *Motorcyclist Jailed for 26 Hours for Videotaping Gun-Wielding Cop*, PIXIQ (April 16, 2010, 2:46 AM), http://www.pixiq.com/article/maryland-motorcyclist-spends-26-hours-in-jail-on-wiretapping-charge-for-filming-cop-with-gun (attributing YouTube upload to Graber).

ster, and demands that Graber get off his motorcycle. Only after telling Graber that he is "state police" does the man put the gun away. Graber gets off the bike, and the video ends.

Graber's mistake, as the Maryland state circuit court later noted, was that he "did not tell the Troopers he was recording the encounter nor did he seek their permission to do so."[18] Even though Graber posted the video online to question the police officer's use of his gun in the situation,[19] the footage clearly showed that Graber in no way attempted to secure the officer's consent before recording.[20] The Harford County State Attorney, Joseph I. Cassilly, then prosecuted Graber, later acknowledging he did so in an attempt to spark the Maryland state legislature into changing the law.[21] Thus Graber was ultimately charged with a crime because he used a small device to record someone on the street and later posted the video to YouTube.

However, the text of the statute did not support prosecuting Graber for his actions. In criminalizing the interception of an "oral communication," Maryland defined the term to mean "any conversation or words spoken to or by any person in *private* conversation."[22] Analogizing to a civil claim that required the plaintiff to show a reasonable expectation of privacy before the Maryland Court of Special Appeals would find an "oral communication,"[23] the circuit court in *Graber* held that a police officer's stop of a motor vehicle on a public highway did not constitute a "private conversation."[24] In reaching that decision, Judge Emory A. Plitt Jr. concluded, "Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public.

18. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *4.

19. Graber titled his YouTube posting "Cop Pulls Out Gun On Motorcyclist" to call attention to that moment. *See* GRABER VIDEO, *supra* note 17.

20. Maryland allows the recording of a conversation when "all of the parties to the communication have given prior consent." MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (LexisNexis 2011).

21. Cassilly told a reporter he believes the statute "criminalizes all sorts of conduct that government has no business regulating." Justin Fenton, *Recording Police Likely OK, Attorney General Says*, BALT. SUN, July 30, 2010, http://articles.baltimoresun.com/2010-07-30/news/bs-md-attorney-general-wiretap-20100730_1_police-officers-recording-police-law-enforcement.

22. MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (LexisNexis 2011) (emphasis added).

23. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *10–11 (quoting Fearnow v. Chesapeake Telephone, 655 A.2d 1, 33 (Md. Ct. App. 1995)).

24. *Id.* at *7.

When we exercise that power in public fora, we should not expect our actions to be shielded from public observation."[25]

Judge Plitt's holding sides with citizens who seek to use their increasing access to recording equipment in order to document what they perceive to be police misconduct. While video footage may not be able to resolve issues of fact absolutely,[26] its existence and admission in court can constitute powerful evidence that neither citizens nor police departments would want to eliminate entirely. All twelve states that ban the recording of conversations absent all-party consent also have exceptions for police activity.[27] Yet every state recognizes that police should be able to record the activity of citizens in situations where it may prove necessary to discover or prevent the commission of a crime. If that video evidence, despite its inherent flaws and need for interpretation, has enough value to override the privacy interests of those being recorded, it seems reasonable that the value of deterring present and future police misconduct should also override any privacy interests that police officers possess.

Moreover the conflict between the police's use of state authority and the public's desire to check that authority can also apply more broadly to a larger group of actors exercising some kind of state power. In *Graber*, Judge Plitt's assertion that "[t]hose of *us* who are public officials . . . should not expect *our* actions to be shielded from public observation"[28] implicitly suggests a more expansive reading that one that would hold public officials other than police officers similarly subject to citizen recording. The ideal balance between the exercise of state power and the public's ability to check it is thus not an issue limited to concerns about police misconduct. It implicates every state actor, and with the seemingly limitless scope

25. *Id.* at *35.

26. *Cf.* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (noting that the video evidence seen as incontrovertibly conclusive by the Supreme Court in *Scott* was viewed differently by different social groups, suggesting that the Court's opinion substantively privileged one group's view and denied another's).

27. *See* CAL. PENAL CODE §§ 633 (West 2012); CONN. GEN. STAT. § 53a-187(b) (2011); FLA. STAT. ANN § 934.03(2)(c) (West Supp. 2011); 720 ILL. COMP. STAT. ANN. 5/14-3(g) (West 2011); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(2) (LexisNexis 2011); MASS. GEN. LAWS ch. 272, § 99(D)(1)(c) (2011); MICH. COMP. LAWS § 750.539g(a) (2011); MONT. CODE ANN. § 45-8-213(1)(c) (2011); NEV. REV. STAT. § 179.460(1) (2011); N.H. REV. STAT. ANN. § 570-A:2(II)(c)–(d) (2011); 18 PA. CONS. STAT. ANN. § 5704(2) (West 2011); WASH. REV. CODE ANN. § 9.73.090(2) (West 2010).

28. *Graber*, 2010 Md. Cir. Ct. LEXIS 7, at *35 (emphasis added).

of technological possibility, normative principles must define the range of acceptable citizen recording.

This Note will attempt to define that range. Part I reviews both the federal and state wiretapping statutes, focusing primarily on the legislative histories of the dozen state statutes that require all parties to consent to recording before it can occur.[29] Part II then considers the three factors that should circumscribe a citizen's right to record state action: (1) whether the actor is a public official, (2) whether the actor is exercising a public duty, and (3) whether the actor is in a public forum. I argue that citizens should be able to record their interactions with any public official exercising a public duty in a public forum, regardless of whether the state's wiretapping statute includes an all-party consent requirement.

I.
FEDERAL AND STATE WIRETAPPING STATUTES

In order to describe the situations in which an exception to the all-party consent requirement should apply, it is first necessary to understand the policy rationales supporting the requirement. This section will outline those various justifications. Part A will briefly review the relevant history of federal wiretapping law, and Parts B, C, and D will then discuss the three rationales state legislatures have used to justify departing from the federal norms: the privacy of the conversation, the autonomy of the participants, and a combination of the two.

A. The One-Party Consent Standard in Federal Law

The development of wiretapping law in the United States has predictably followed the development of technologies that made wiretapping possible. In 1928, not long after the telephone became a staple of modern communication, the Supreme Court decided *Olmstead v. United States*, holding that warrantless police recording of the defendant's telephone conversations did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.[30] Writing for the majority, Chief Justice Taft distinguished the recording of telephone conversations from the opening of a sealed letter on the grounds that the letter "is a paper, an

29. The issue of citizen recording is not as prominent in the other 38 states, since citizens could presumably record their interactions with any state actor merely by consenting to their own acts of recording.

30. Olmstead v. United States, 277 U.S. 438, 464 (1928).

effect,"[31] and therefore must be searched to be discovered, while a telephone conversation, even when tapped and recorded, can be "secured by the use of the sense of hearing and that only."[32] Thus the Court concluded that the Fourth Amendment does not protect telephone conversations because no searching or seizing occurs.

Yet the Court in *Olmstead* also acknowledged that "Congress may of course protect the secrecy of telephone messages . . . by direct legislation,"[33] suggesting that the issue was not one for the Court to decide. Six years later, Congress accepted the Court's invitation by passing the Communications Act of 1934, which prohibited the interception of "any communication."[34] However, circuit courts differed in deciding whether the tapping of a telephone conversation with one party's consent violated the Act.[35] The Supreme Court eventually resolved the issue, deciding that all-party consent was not required as a prerequisite to recording communications under the statute.[36] The consent of one party would suffice.

The one-party-consent ethos survived the overruling of *Olmstead* in *Katz v. United States* in 1967.[37] While the Court in *Katz* rejected *Olmstead*'s conception of a search as requiring physical trespass,[38] it left open the possibility that recording a conversation with only one party's consent may not violate the Fourth Amendment.[39] The year after *Katz* was decided, Congress amended the Communications Act by passing the Omnibus Crime Control and

31. *Id.* at 464. The Fourth Amendment only protects "[t]he right of the people to be secure in their persons, houses, *papers, and effects*." U.S. CONST. amend. IV (emphasis added).

32. Olmstead, 277 U.S. at 464.

33. *Id.* at 465.

34. Communications Act of 1934, Pub. L. No. 416, § 605, 48 Stat. 1064, 1103–04 (amended 1968). The text was revised to prohibit "any *radio* communication." 47 U.S.C. § 605(a) (2006) (emphasis added).

35. *Compare*, *e.g.*, United States v. Polakoff, 112 F.2d 888, 889 (2d Cir. 1940) (requiring the consent of both parties before a third party can listen to a telephone conversation), *with* United States v. White, 228 F.2d 832, 835 (7th Cir. 1956) (finding no interception of a communication when one party to a conversation consents to a third-party listener).

36. *See* Rathbun v. United States, 355 U.S. 107, 111 (1957) ("Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.").

37. Katz v. United States, 389 U.S. 347 (1967).

38. *Id.* at 353.

39. *Id.* at 358 n.22 (finding that "[a] search to which an individual consents meets Fourth Amendment requirements").

Safe Streets Act of 1968,[40] which outlaws the interception of "any wire, oral, or electronic communication."[41] The Act provides an exception when the person recording "is a party to the communication or where one of the parties to the communication has given prior consent to such interception."[42] The one-party consent standard survived even as the rest of the *Olmstead* conception of wiretapping and privacy fell.

Under the federal one-party consent standard, people can record their conversations with others regardless of whether the other participants would consent to having their words preserved. While this rule has the advantage of simple administration and comports with general expectations that what is told to one person can usually be repeated to another,[43] some state legislatures felt that such a rule was not protective enough of individual privacy.[44] Since the federal standard is a floor that allows states to provide more privacy protection if they so choose,[45] these states adopted the all-party consent requirement in the wake of Congress' 1968 Act.[46] The states could not have anticipated that one day, decades later, the technology required to record public officials without their knowledge would be commonplace. The rationales for these state laws as

40. Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711 (2006).

41. 18 U.S.C. § 2511(1)(a) (2006).

42. 18 U.S.C. § 2511(2)(d) (2006). For a view of the one-party consent provision in the federal statute as a response to *Katz*, see Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 842 (1998).

43. *See, e.g.*, United States v. White, 401 U.S. 745, 753 (1971) (holding that the Fourth Amendment does not prohibit informants from recording their conversations with suspects in part because informants can recount the conversations at trial and the recordings are merely "more accurate version[s] of the events in question").

44. Proponents of the all-party consent rule argue that while people may expect their conversations to be recalled by others, they do not expect them to be repeated verbatim. *See, e.g.*, State v. Goetz, 191 P.3d 489, 500 (Mont. 2008) ("[W]hile we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.").

45. *See* Bast, *supra* note 42, at 845 ("[S]tate statutes must protect the individual's privacy at least as much as the Federal Act, but the states may provide more protection.").

46. For example, Maryland legislators debated the all-party consent requirement in the early 1970s and eventually passed a bill that included it in 1977. See Part I.B.5, *infra*, for a full recounting of this legislative process.

expressed through their legislative histories present issues that any exception to the all-party consent rule must consider.

Different privacy concerns underlie the creation of the various all-party consent rules. Some states focus on the nature of the conversation as a proxy for privacy, while others focus on an individual's consent to recording as a proxy for autonomy concerns. Still others straddle the line, embracing both rationales. Each set of state rationales must be considered individually because different rationales for the all-party consent rule implicate different grounds for a potential exception.

B. The Nature of the Conversation

The first rationale for adopting the all-party consent rule considers the kind of conversation that can be protected from recording. According to this rationale, having consent to record from every party to a conversation signals that the conversation itself is not a private one and can therefore be preserved. In theory, then, if other factors suggest that the conversation in question is not private, it should be recordable even without the explicit consent of every individual. In other words, consent to record signals that the conversation is not private, but consent need not be the only possible signal. As described in depth below, six states relied on this notion of privacy to justify the all-party consent rule: Washington, Pennsylvania, California, Nevada, Connecticut, and Maryland.

1. Washington

Judicial interpretations of Washington's all-party consent rule offer a clear example of how a statutory focus on the nature of private conversations can provide the basis for exceptions to the rule. Washington is one of just ten states to protect personal privacy in its state constitution,[47] and its conception of the all-party consent rule prohibits people from recording any "[p]rivate conversation . . . without first obtaining the consent of all the persons engaged in the conversation."[48] The statutory focus on protecting "private" conversations implies that if the conversation in question is not private, then the ban on recording does not apply.

47. *See* James A. Pautler, Note, *You Know More Than You Think:* State v. Townsend*, Imputed Knowledge, and Implied Consent Under the Washington Privacy Act*, 28 SEATTLE U. L. REV. 209, 218 (2004). The other nine states are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, and South Carolina.

48. WASH. REV. CODE ANN. § 9.73.030(b) (West 2010).

Washington's courts have generally adopted this position. While the Washington Supreme Court has never decided a case on this issue, lower state courts have uniformly found exceptions to the State's all-party consent requirement when the circumstances surrounding a recorded conversation suggest that the conversation itself is not private. In *State v. Flora*, a state court explicitly found that police officers exercising their official duties in public are not protected by the all-party consent rule because their personal privacy interests fail the threshold question of "whether the matter at issue ought properly be entitled to protection at all."[49] Thus, in Washington, if a conversation's characteristics are not private—as official police activity on a public street was found not to be[50]—then any autonomy-based privacy interests of the individual participants are irrelevant.[51] Federal courts interpreting the state statute have come to similar conclusions.[52]

2. Pennsylvania

Similarly focusing on the nature of the conversation at issue, Pennsylvania's wiretapping statute bans the recording of "any wire, electronic or oral communication"[53] without all-party consent. The statute in turn defines "oral communication" to include only utterances "by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation."[54] In applying the statute to police officers, state courts have effectively focused only[55] on whether the circumstances of a conversation suggest it was private. Thus suspects are free to secretly record their interviews with police, not because interviewing officers subjectively expect them to do so, but because police usually record the interviews anyway, suggesting that conversations with police officers are not objectively private.[56] Police conversations in a squadroom can also be recorded without consent since

49. State v. Flora, 845 P.2d 1355, 1357 (Wash. App. Div. 1 1992).

50. In *Flora*, police officers approached the defendant because they received a tip that he had violated an ongoing protective order, and they discussed the issue with him on the street outside Flora's house. *Id.* at 1355–56.

51. For a full discussion of the autonomy-based rationale for the all-party consent requirement, see Section I.C, *infra*.

52. *See*, *e.g.*, Alford v. Haner, 333 F.3d 972, 976 (9th Cir. 2003) ("Tape recording officers conducting a traffic stop is not a crime in Washington.").

53. 18 PA. CONS. STAT. ANN. § 5703(2) (West 2011).

54. *Id.* at § 5702.

55. *See* Part I.D, *infra*.

56. *See* Commonwealth v. Henlen, 564 A.2d 905, 906 (Pa. 1989).

they can "be heard without amplification."[57] The Pennsylvania Supreme Court has not ruled on the question of whether police officers can ever engage in private conversations,[58] but its decisions on police activity in other contexts suggest that they can not.

3. California

Just as Pennsylvania courts have suggested that the state's wiretapping statute only applies to private conversations, the California Supreme Court has implied that a similar rationale controls interpretations of its state wiretapping law. California adopted the all-party consent rule in 1967 when legislative distaste for more relaxed judicial doctrine culminated in an attempt to quell the "serious threat to the free exercise of personal liberties" created by unauthorized recording.[59] However, in the context of recording conversations, the rule only applies to "confidential communication[s],"[60] defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . . or . . . in which the parties to the communication may reasonably expect that the communication may be . . . recorded."[61] This definition creates a "confidential communication" not when parties actually expect privacy, but only when it is objectively reasonable for them to do so.[62] Thus, in California, even when a party to a conversation does not consent to recording, the conversation can still be recorded if it is of a type

57. Agnew v. Dupler, 717 A.2d 519, 524 (Pa. 1998).

58. The Pennsylvania Supreme Court expressly declined to decide this issue in *Henlen*. *Henlen*, 564 A.2d at 907 (declining to reach the issue of whether "a police officer acting in his official capacity . . . waives the protections afforded under the Act").

59. CAL. PENAL CODE § 630 (West 2012). *See generally* H. Lee van Boven, *Electronic Surveillance in California: A Study in State Legislative Control*, 57 CAL. L. REV. 1182, 1191 n.57 (1969) (noting that prior to the enactment of California's privacy statute in 1967, "both California and federal courts had permitted all forms of participant monitoring").

60. CAL. PENAL CODE § 632(a) (West 2012).

61. *Id.* § 632(c).

62. *See generally* Flanagan v. Flanagan, 41 P.3d 575, 576–77 (Cal. 2002) (endorsing the standard "that a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded"). This approach greatly resembles that taken by the Pennsylvania courts, as discussed in Part I.B.2, *supra*.

that does not deserve protection.[63] In theory, this distinction could also apply to police officers.[64]

4. Nevada (and Connecticut)

The Nevada Supreme Court has interpreted that state's wiretapping statute[65] to apply the all-party consent rule only to certain types of conversations. In *Lane v. Allstate Insurance Co.*,[66] the court noted an odd distinction in Nevada state law that applied the all-party consent rule to phone conversations,[67] but only required one party to consent to the recording of an in-person conversation.[68] This is the clearest example of the privacy rationale that focuses on the nature of the conversation: the exact same conversation could have different standards applied to it based purely on its medium. Thus, for telephone conversations, Nevada always applies the all-party consent rule, whereas Washington and Pennsylvania courts ask whether the conversation was private; conversely, for in-person conversations, Nevada never applies the all-party consent rule while Washington and Pennsylvania might.[69] While this scheme may seem odd, Nevada is not alone in enforcing it: Connecticut's statute functions similarly.[70]

63. *See, e.g.*, People v. Nakai, 107 Cal. Rptr. 3d 402, 418 (Ct. App. 2010) (finding that defendant "reasonably indicated" he wanted a communication kept private, but that the conversation itself could be recorded or overheard and so did not merit protection under § 632).

64. During the height of the Occupy Wall Street protests in last November, a video depicting two University of California, Davis police officers pepper spraying peaceful student protesters went viral online. *See* Aggie TV, *UC Davis Protestors Pepper Sprayed*, YOUTUBE (Nov. 18, 2011), http://www.youtube.com/watch?v=6AdDLhPwpp4. Presumably, recording and disseminating the video is legal even though the officers involved did not consent to the recording.

65. NEV. REV. STAT. § 200.620 (2011).

66. 969 P.2d 938, 941 (Nev. 1998).

67. *See* § 200.620.

68. *See* § 200.650.

69. Since people looking to record their interactions with police officers would most likely be doing so in person, the Nevada wiretapping statute may not apply to the majority of interactions this Note argues should be exempted from the all-party consent requirement. However, private citizens may still wish to record their own phone conversations with public officials, so the Nevada statute is not entirely outside the scope of this Note's inquiry.

70. In Connecticut, the all-party consent rule only applies to telephone conversations and only results in civil damages. *See* CONN. GEN. STAT. § 52-570d (2011). Connecticut's criminal wiretapping statute also includes the all-party consent rule, but it only applies to recordings "by a person not present" at the conversation. § 53a-187(a). Because any citizen recording of public officials would only implicate recording by a participant in the conversation, Connecticut's criminal wiretapping statute is beyond the scope of this note.

The Nevada court in *Lane* upheld the distinction in part because in 1985 a proposed amendment to loosen the all-party consent rule for police activity was defeated in the state legislature because of concerns that police officers would abuse the lower standard and record too much.[71] This logic reveals that when the Nevada legislature upheld the need to apply the all-party consent rule to police activity, it justified the decision not based on concerns for the privacy of Nevada's citizens, but because of a need to regulate police activity. While the two concerns are related, they are not identical.[72] In this light, the all-party consent rule is less a protection of individual privacy than a prophylactic tool to regulate police behavior by selecting out certain types of conversations that should be recorded less frequently.[73] In other words, when bound up with deterring official misconduct, the all-party consent requirement does not solely aim to protect individual privacy; instead, it prevents recording so as to accomplish a goal outside the privacy realm.

5. Maryland

The history of Maryland's wiretapping statute—culminating in the *Graber* decision[74]—highlights the process by which state legislatures use the all-party consent requirement as a tool to regulate police behavior in the guise of protecting individual privacy.

The Maryland General Assembly originally passed a version of the statute with the one-party consent provision, but the governor vetoed it.[75] In a letter explaining his veto to the Speaker of the state House of Delegates, the governor quoted the portion of the bill that contained the one-party consent provision and concluded that

71. *See Lane*, 969 P.2d at 941 ("[L]egislators continued to express concern over potential abuses when judicial oversight is lacking.").

72. *See* Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH U. L. REV. 303, 307 (2010) ("Current Fourth Amendment jurisprudence governing searches contains two contrasting narratives, one focused on regulating police and the other on protecting privacy. Sometimes the two narratives coordinate; regulation of police can be privacy protecting. At other times the narratives diverge.").

73. Connecticut's granting of a private right of action for civil damages when telephone calls are recorded without the consent of all parties fits squarely into this category. The Supreme Court of Connecticut has acknowledged that the rule was enacted largely to ensure that "recording by officials not involved in law enforcement be done with the knowledge of both parties." Washington v. Meachum, 680 A.2d 262, 272 (Conn. 1996).

74. State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7 (Sept. 27, 2010).

75. *See* Letter from Marvin Mandel, Governor of Md., to Hon. Thomas Hunter Lowe, Speaker of the House of Delegates of Md. (June 1, 1973) (electronic copy on file with author).

the "opportunity for unwarranted spying and intrusions on people's privacy authorized by [the] bill is frightening; and recent revelations have given clear indication that the possibilities of abuse are more real than theoretical."[76] The "recent revelations" probably referred to the Baltimore Police Department's practice dating back to the 1960s of asking phone company employees to listen in on select telephone conversations before police officers were able to secure warrants and listen themselves.[77] The practice ended in 1973 when the governor vetoed the bill.[78] In 1977, the state legislature passed a revised version of the bill that included the all-party consent requirement and the governor signed it into law. State courts responded by interpreting the requirement strictly, reflecting how important it was to the bill's enactment.[79]

The great irony in the history of Maryland's wiretapping statute is that the governor's stated focus on individual privacy grew out of a scandal implicating the blatant misconduct of police officers. Thus the statutory birth of the state's all-party consent requirement, while promoted as a victory for privacy interests, was primarily an attempt to deter state officials from gaining access to conversations they should not hear. Much like how Nevada courts have interpreted the state's wiretapping statute more from the perspective of regulating law enforcement rather than protecting individual privacy, Maryland's statute internalized this distinction in the legislative process leading up to the passing of the law. The regulation of police activity, not the privacy of Maryland citizens, was at issue when the governor vetoed the bill.

Despite this focus on police activity, the "controversial" aspect of the law when it was passed was that it had multiple consent standards for different situations, deviating from an all-party consent rule for police activity.[80] At the time, the American Bar Association advocated imposing an all-party consent rule on police infor-

76. *Id.*

77. *See* Marianne B. Davis & Laurie R. Bortz, *The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. BALT. L. REV. 374, 385 (1978).

78. *Id.* at 383–84.

79. *See, e.g.*, Adams v. State, 406 A.2d 637, 642 (Md. Ct. Spec. App. 1979) (finding that "by making both participants' consent mandatory, [Maryland] law has imposed stricter requirements for civilian monitoring than has federal law").

80. *See* Davis & Bortz, *supra* note 77, at 398 (characterizing the provisions that allow the police to record some conversations with only one-party consent "[u]ndoubtedly, the most significant and controversial change from earlier Maryland law").

mants,[81] but the Maryland legislature disagreed.[82] From the perspective of the present day, the conflict underscores how stated concerns in Maryland for protecting privacy through the all-party consent rule cannot be separated fully from worrying that police officers will be too active in their use of wiretapping technology.

Once the stated goal of protecting privacy is revealed as a kind of proxy for figuring out what kinds of conversations should be off limits to the police, it seems absurd to enforce the statute against someone like Anthony Graber, who acted with the intent to expose police wrongdoing. Thus, in holding that the all-party consent rule should not apply when citizens record police officers, Judge Plitt noted in *Graber* that at the very least, police officers' interactions with citizens "in public places"[83] are not the types of "private"[84] conversations that Maryland's wiretapping statute seeks to protect.[85]

Ultimately, while the goals of protecting privacy and deterring police misconduct overlap, they are not coextensive. If they were, the all-party consent rules in Maryland and Nevada would be dramatically overbroad because they would prohibit citizens from recording each other without any state actors involved. By using the all-party consent requirement, which ostensibly applies even in situations in which private citizens record one another, as a means to accomplish the end of ensuring that police only act in certain ways, the wiretapping statutes in these states raise the question of whether they should be applied in every circumstance in which they conceivably could. Thus the goal of deterring police misconduct through the all-party consent requirement puts pressure on state courts not to apply the statute when there is no reason to worry about police misconduct.

The process by which courts can determine whether police regulation is implicated in any given case necessarily shifts the inquiry to the nature of the conversation being recorded, rather than to whether the participants have affirmatively consented to such recording. Therefore, a broader exception to the rule that might en-

81. *See id.* at 394 n.145 (summarizing the ABA's suggested legislation as seeking in part "[t]o disallow interception where not all parties consent, *even where acting under police direction*" (emphasis added)).

82. *Id.*

83. State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *13 (Md. Cir. Ct. Sept. 27, 2010).

84. MD. CODE ANN., CTS. & JUD. PROC. § 10-401(2)(i) (LexisNexis 2011) (defining "oral communication" as "any conversation or words spoken to or by any person in *private* conversation") (emphasis added).

85. *See* § 10-402(a)(1) (prohibiting the interception of any "oral . . . communication" without the consent of all parties).

compass state actors other than police officers in situations other than police stops should ask whether the kinds of conversations sought to be protected by the rule align with the kind of conversation potentially to be exempted from it.

C. The Consent of the Participants

The second rationale for adopting the all-party consent rule focuses instead on individual liberty as reflected through an individual's consent to being recorded. In contrast to defining privacy by focusing on the nature of the conversation, this rationale protects privacy in the sense that it prohibits recording to respect the control each participant should have over the preservation and distribution of his own speech. Thus the privacy being protected is that of the autonomous individual who is recorded without consent. To overcome this privacy/autonomy rationale, any exception to the all-party consent rule would therefore have to implicate only conversations in which the people being recorded without consent either have no *ex ante* privacy interests at stake or have forfeited whatever privacy interests they do have because their consent can be implied even if it was not granted explicitly. Two states adopted the all-party consent rule explicitly to protect this autonomy-based privacy: Illinois and Massachusetts.

1. Illinois

Illinois adopted this autonomy rationale most explicitly, in part because the current statute is a legislative response to state judicial interpretations of the original law. The state's wiretapping statute has included the all-party consent rule since it was first passed as part of the Criminal Code of 1961, outlawing the recording of "all or any part of any oral conversation"[86] without "the consent of any party thereto."[87] However, in 1986, the Illinois Supreme Court held that the statute did not require the consent of every party to the conversation before recording could take place if the conversation was not a private one.[88] Considering a factual scenario similar to that in *Graber*,[89] the court read Illinois' statute to embrace the con-

86. ILL. REV. STAT., ch. 38, para. 14-2(1) (1961).

87. ch. 38, para. 14-2(1)(A).

88. *See* People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986) ("The primary factor in determining whether the defendant in this case committed the offense of eavesdropping is not, as the appellate court reasoned, whether all of the parties consented to the recording of the conversation.").

89. In *Beardsley*, the defendant attempted to record his interaction with a police officer after being pulled over for speeding. *See id.* at 347. However, unlike

cept of privacy based on the nature of the conversation; thus even though the defendant was recording the conversation of two police officers, he did not violate the statute because the officers' conversation was not private while the defendant was present.[90]

The Illinois state legislature responded in 1993 by amending the statute to require explicitly the consent of every party regardless of the nature of the conversation. The 1993 amendment defines "conversation" in the statute as "any oral communication between two or more persons *regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation*,"[91] tracking exactly the Illinois Supreme Court's language in *People v. Beardsley*[92] to overturn that case. And in case that approach somehow seemed too subtle, proponents of the amendment in both houses of the state legislature noted their intent to overturn *Beardsley* in the legislative debates. In the state Senate, Senator Hawkinson described *Beardsley* as "essentially overturn[ing] our own statute," stating that the amendment would "revert that law back to what we intended . . . so that citizens . . . will not be able to tape each other without consent."[93] The next day, in the House of Representatives, Representative Dart described the amendment as being "in answer to the *Beardsley* case"[94] and said that the Illinois Supreme Court had "misinterpreted the statute."[95]

Since that 1993 amendment took effect, Illinois courts have applied the wiretapping statute regardless of the privacy of the conversation, focusing exclusively on the question of consent.[96] Thus the

Anthony Graber, Robert Beardsley took the recording equipment with him into the police squad car after he refused to show a driver's license, recording the officers' conversation while he was sitting in the back seat. *See id.* at 347–48. Since the officers knew Beardsley was in the car, the court found that their conversation in the front seat was no longer private. *Id.* at 350.

90. *See id.* at 350. The court noted that "it seems logical that if the officers intended their conversation to be entirely private, then they would have left the squad car," suggesting that the intent of the nonconsenting party may affect the legal outcome. *Id.* In the same paragraph, however, the court noted that such intent only matters "under circumstances justifying such expectation." *Id.* Thus the court's approach has more in common with the external privacy rationale because the statute can only apply to conversations the court deems to be private.

91. 720 ILL. COMP. STAT. 5/14-1(d) (2011) (emphasis added).

92. *See Beardsley*, 503 N.E.2d at 350 (framing the central issue as "whether the officers/declarants intended their conversation to be of a private nature under circumstances justifying such expectation").

93. S. 88-69, 1st Reg. Sess., at 32 (Ill. 1993) (statement of Sen. Hawkinson).

94. H.R. 88-75, 1st Reg. Sess., at 25 (Ill. 1993) (statement of Rep. Dart).

95. *Id.* at 26 (statement of Rep. Dart).

96. *See, e.g.*, *In re* Marriage of Almquist, 704 N.E.2d 68, 71 (Ill. App. Ct. 3d Dist. 1998) ("[T]he addition of a definition of 'conversation' to the eavesdropping

state's justification for the all-party consent rule has shifted from a judicially created rationale focusing on the nature of the conversation to a legislatively created approach centered on the autonomy interest underlying consent.[97] While the constitutionality of Illinois' wiretapping statute is now in doubt,[98] the state is not alone in adopting this approach.

2. Massachusetts

The judicial doctrine that developed in Massachusetts following the adoption of the all-party consent rule in that state suggests that once an autonomy-based approach is firmly entrenched, courts still have to develop a method to determine whether parties have consented to recording in a given case.[99] So when Massachusetts overhauled its wiretapping statute in 1968 by implementing a definition of privacy based on individual consent,[100] state courts had to determine exactly when recording by "any person other than a per-

statute was an effort narrowly tailored to the goal of removing any expectation of privacy element from the crime of eavesdropping.").

97. The importance of this distinction has increased in light of the recent trend of police departments requiring officers to wear video- and audio-recording cameras attached to their chests at all times while on duty. *See* Erica Goode, *Video, a New Tool for the Police, Poses New Legal Issues, Too*, N.Y. TIMES, Oct. 12, 2011, at A14, *available at* http://www.nytimes.com/2011/10/12/us/police-using-body-mounted-video-cameras.html (noting that "more than 1,100 police agencies across the country" have purchased such devices). Such recording would presumably be illegal in a state like Illinois since the individuals being recorded would not have consented to such recording by police. Conversely, such recording would presumably be legal in states that consider the nature of the conversation, since a police officer's conversations are not private. Such recording may violate the privacy rights of those being recorded for other reasons, however.

98. *See* ACLU of Ill. v. Alvarez, No. 11-1286, slip op. at 47 (7th Cir. May 8, 2012) ("Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties—including audio recording that implicates no privacy interests at all.").

99. Naturally, this question does not concern states that consider privacy based on the nature of the conversation. Likewise, the question of whether a conversation is objectively reasonably private or deserving of protection does not concern states that exclusively follow the autonomy-based rationale.

100. The statute's preamble declares in part the intent to curb "the secret use" of recording equipment, suggesting that the problem with such equipment is not that it is used in certain situations, but rather that it is used without the consent of all the parties to a conversation. *See* MASS. GEN. LAWS ch. 272, § 99(A) (2011).

son given prior authority by all parties" to a conversation had occurred.[101]

In 1976, the Supreme Judicial Court of Massachusetts established the necessary framework. In *Commonwealth v. Jackson*, the court was faced with the question of whether a recorded telephone conversation in which the defendant said, "[y]ou know, I know the phone is tapped," but nonetheless never consented to the recording, fell under the wiretapping statute's prohibition of interceptions.[102] Noting that the statute only defines "interceptions" to mean "to secretly hear [or to] secretly record,"[103] the court reasoned that if the recording was not a secret, it did not fall under the statute.[104] Thus the court held both that the defendant's actual knowledge of the recording could take the action outside the scope of the statute and that such knowledge could be implied by "clear and unequivocal objective manifestations of knowledge, for such indicia are sufficiently probative of a person's state of mind as to allow an inference of knowledge."[105]

Ultimately, the court read the statute to focus on the mental state of the person being recorded because the legislature had focused on individual consent when crafting the contours of the wiretapping law. Such a judicial approach loosens the strict all-party consent rule by allowing courts to find a kind of implied consent when no explicit authorization exists.[106] The line between implied knowledge and lack of knowledge is still maintained in Massachusetts state courts today.[107]

Taken together, the Illinois and Massachusetts experiences with the all-party consent rule suggest that to overcome the contours of an autonomy-based approach to privacy, any exception must either cover only individuals who have no personal interest in

101. § 99(B)(4) (defining "interception," which is made illegal by § 99(C)(1)).

102. *See* Commonwealth v. Jackson, 349 N.E.2d 337, 339 (Mass. 1976).

103. *Id.* (alteration in original) (quoting MASS. GEN. LAWS ch. 272, § 99(B)(4)).

104. *See id.* ("[I]f the two recordings in this case were not made secretly, they do not constitute an 'interception' as defined by § 99 B 4.").

105. *Id.* at 340.

106. *See* Jack I. Zalkind & Scott A. Fisher, *Participant Eavesdropping – The All Party Consent Requirement*, 22 BOS. B. J. 5, 8 (1978) ("[*Jackson*] in effect permits an 'interception' of a communication where the statements of the aggrieved party imply consent, even though in actuality, no 'prior authority' had been obtained from 'all parties.'").

107. *See, e.g.*, Commonwealth v. Boyarsky, 897 N.E.2d 574, 579 (Mass. 2008) (applying *Jackson*).

privacy worth protecting or—if a state legislature forecloses that route as Illinois' did—embrace only situations in which individuals with privacy interests can be found to imply their consent to recording.[108] This suggests a different potential exception than one focused on what classes of conversations should be exempted. However, since some states adopted the all-party consent rule on the basis of both rationales discussed above, any realistic exemption would have to account for both justifications.

D. Conversation and Consent

Rather than focusing exclusively on either rationale for the all-party consent rule, four states adopted the rule on the basis of both theories: Florida, Montana, Michigan, and New Hampshire. The laws in these states are motivated by concerns for both the private nature of conversations and the consent of the participants. Because of this complexity, courts in these states sometimes adjust the reach of the all-party consent requirement by using the medium of the conversation as a proxy to find implied consent when explicit consent does not exist.

1. Florida

Florida, for example, prohibits recording speech "uttered by a person exhibiting an expectation that such communication is not subject to interception" under "circumstances justifying such expectation."[109] Although the language of Florida's wiretapping statute is similar to Pennsylvania's,[110] the two states have interpreted their respective laws differently. In Pennsylvania, courts have focused exclusively on the objective reasonableness of a privacy expectation, even under circumstances suggesting that the speakers did not subjectively expect their conversations to be private.[111] Florida courts, on

108. Naturally, an exception that did both would be fine as well.

109. FLA. STAT. ANN. § 934.02(2) (West Supp. 2011).

110. Pennsylvania's law defines "oral communication" to include statements "by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 PA. CONS. STAT. ANN. § 5702 (West 2011). For a full discussion of Pennsylvania's wiretapping statute, see Part I.B.2, *supra*.

111. *See, e.g.*, Commonwealth v. Henlen, 564 A.2d 905 (Pa. 1989). In *Henlen*, the Supreme Court of Pennsylvania first found that a state trooper who allowed a third party to be present for part of a suspect interview could not have "expected his conversation with Appellant to remain confidential." *Id.* at 906. Rather than concluding that the subjective prong ended the inquiry, however, the court went on to hold that the trooper did not "possess[ ] a *justifiable expectation* that his words would not be subject to interception." *Id.* at 907 (emphasis added). By ruling on

the other hand, focus on both prongs of the intended statutory inquiry.

The Florida statute therefore resembles a classic expectation of privacy inquiry,[112] which incorporates consent because anyone who consents to recording could not subjectively expect the conversation to be private. The two provisions of the statute—so integrated that they appear in the same *sentence* defining "oral communication"—effectively treat the finding of a private communication as a threshold matter, which, if met, triggers a judicial inquiry into the issue of consent.[113] If a conversation is deemed private in nature, then Florida law only considers recording lawful "when *all* of the parties to the communication have given prior consent."[114]

While the Florida legislature sought to enact a broad standard of privacy protection when it adopted the all-party consent rule in 1974,[115] incorporating both rationales actually limits the potential scope of the act. To be sure, any semblance of the all-party consent requirement necessarily increases the protection offered federally. However, the two inquiries contemplated by Florida's law narrow the application of the all-party consent requirement. Since either prong can establish a lawful basis for recording, Florida law allows the recording of conversations that other states would not.[116] Since Florida courts have interpreted the scope of "private" conversations

the objective prong of the statute when the subjective prong alone could have resolved the inquiry, the Pennsylvania Supreme Court effectively read the subjective prong out of the state law.

112. The subjective-objective approach recalls Justice Harlan's "reasonable expectation of privacy" test in *Katz*. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

113. For a recent example, see *Jackson v. State*, 18 So. 3d 1016, 1030 (Fla. 2009) ("[A] speaker must have an actual subjective expectation of privacy and our society must recognize that the expectation is reasonable for the oral conversation to be protected.").

114. FLA. STAT. ANN. § 934.03(2)(d) (West Supp. 2011) (emphasis added). Police, however, can record with the consent of only one party to the conversation. § 934.03(2)(c).

115. By court accounts, the *only* comment on the floor of the Florida House of Representatives when considering the bill stated that it would "make it illegal[ ] for a person to record a conversation, even though he's a party to it, without the other person's consent." *See* State v. Tsavaris, 394 So. 2d 418, 422 (Fla. 1981) (quoting from a tape of the legislative debate).

116. For example, if a conversation is found not to be private, recording would be allowed regardless of whether or not a party consents, violating the autonomy rationale discussed in Part I.C, *infra*. Likewise, if a court finds that a party implies his or her consent, recording would be allowed regardless of whether or not other circumstances would suggest it was private, violating the nature of the conversation rationale discussed in Part I.B, *infra*.

narrowly,[117] the range of the all-party consent rule's application is limited even further.

2. Montana

Montana's experience with the all-party consent requirement bears out this tension even more dramatically. In 1972, the state revised its constitution, explicitly including an individual right of privacy in the final version.[118] As one delegate at the 1972 constitutional convention explained, the right "produces . . . a semipermeable wall of separation between individual and state. . . . [W]hat it says is, don't come into our private lives unless you have good reason for being there."[119] This constitutional foundation implicates an autonomy-based rationale for the all-party consent requirement because the state's focus is on protecting an individual right as opposed to a structural concern about what kinds of conversations should and should not be recorded. As the Montana Supreme Court has noted, this emphasis leads to the conclusion that even when people expect their conversations to be repeated, their words cannot be recorded without consent.[120] It is probably for this reason that the state's all-party consent statute explicitly mentions "the knowledge of all parties to [a] conversation,"[121] but not the nature of the conversation in question.

However, the Montana Constitution still allows for recording when there is no personal privacy to invade. Thus, despite the Montana Supreme Court's 2008 finding that the state constitution pro-

117. Only conversations in the home have strong privacy protection in Florida. *See* Carol M. Bast, *Eavesdropping in Florida: Beware a Time-Honored But Dangerous Pastime*, 21 NOVA L. REV. 431, 457 (1996) ("Thus far, Florida courts have not recognized that it is possible to have a reasonable expectation of privacy in a location other than one's home.").

118. *See* MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

119. Larry M. Elison & Dennis NettikSimmons, *Right of Privacy*, 48 MONT. L. REV. 1, 11 (1987) (quoting statement of Delegate Campbell).

120. *See* State v. Goetz, 191 P.3d 489, 500 (Mont. 2008) ("We are convinced that Montanans continue to cherish the privacy guaranteed them by Montana's Constitution. Thus, while we recognize that Montanans are willing to risk that a person with whom they are conversing in their home or other private setting may repeat that conversation to a third person, we are firmly persuaded that they are unwilling to accept as reasonable that the same conversation is being electronically monitored and recorded by government agents without their knowledge.").

121. MONT. CODE ANN. § 45-8-213(1)(c) (2011).

tects privacy beyond the scope of the Fourth Amendment,[122] two years later, in *State v. Meredith*, that same court found that comments made in a police interrogation room were not private, even if the speaker expected them to be.[123] The court found that the speaker "*may* have an expectation of privacy in his statements,"[124] but the conversation itself was not private. Implicitly addressing the issue of consent, the court then found that "there was no reason . . . to make the incriminating statements out loud unless [the speaker] wanted to be overheard. Had he wanted to preserve his privacy, he would not have voiced his thoughts."[125] Although the reasoning may seem circular,[126] the conclusion implies that the speaker did in fact consent to the recording.

State v. Meredith cements Montana's reliance on both rationales for the all-party consent requirement because the judicial inquiry is focused on both the nature of the conversation and the speaker's consent.[127] But that reasoning leaves an open question: does Montana's state law require finding both that the conversation is not private and that consent is implied, or, like under Florida law, is one finding sufficient? *Meredith* does not answer this question. Its dicta suggests that the speaker somehow consented because speaking implies that the speaker wants to be overheard. That interpretation would practically eliminate consent as a factor, but the reasoning has not yet been tested directly. Given the state constitution's emphasis on individual privacy, it seems possible that Montana's reliance on both rationales for the all-party consent requirement will ultimately lead the state to limit recording as much as possible. This position would favor a final rule that requires finding both that a conversation is not private and that the participants all consented explicitly before recording can occur.

122. *See Goetz*, 191 P.3d at 496 ("Article II, Section 10 of the Montana Constitution, in conjunction with Article II, Section 11, grants rights beyond those in the federal constitution and requires an independent analysis of privacy and search and seizure issues.").

123. *See* State v. Meredith, 226 P.3d 571, 580 (Mont. 2010) ("Police interrogation rooms are traditionally areas where people are watched and monitored in some form or fashion whether it be by two-way glass, video taping or audio recording.").

124. *Id.*

125. *Id.*

126. If the mere act of speaking implies that the speech is not meant to be private, then *any* speech could be recorded as long as it is spoken aloud, which is to say that any speech could be recorded.

127. *See Meredith*, 226 P.3d at 571 (considering both whether the defendant implied his consent by speaking and whether his conversation was private).

3. Michigan

Montana's wiretapping statute suggests that reliance on both rationales for the all-party consent requirement can make recording illegal in more circumstances than reliance on only one rationale, while Florida's law suggests the opposite. The law in Michigan does not fit either model. While its wiretapping statute is explicit in adopting the all-party consent rule, state courts have limited its application so severely that the underpinning rationale is muddled and unclear.

In Michigan, eavesdropping is defined as recording "any part of the private discourse of others without the permission of all persons engaged in the discourse."[128] While the text of the statute seems clear in its adoption of the all-party consent requirement, in *Sullivan v. Gray* a state Court of Appeals read it as applying only to third parties, since the "discourse of others" implies that the person recording is not participating in the conversation in question.[129] While the Michigan Supreme Court has neither affirmed nor overruled the Court of Appeals' interpretation,[130] other courts in the state have consistently followed the decision.[131] Thus the explicit all-party consent requirement in Michigan only applies when someone *other* than a participant in the conversation records it. This distinction blends the two rationales for the all-party consent requirement by imagining "private" conversations as those not recorded by one of the participants while also explicitly incorporating consent.

The distinction may have been significant when *Sullivan* was decided in 1982; at the time, small recording technology that could be hidden by a person in a conversation was still relatively unusual. However, as technology has advanced and it has become relatively simple for anyone to record conversations on small devices, the

128. MICH. COMP. LAWS § 750.539a(2) (2011).

129. *See* Sullivan v. Gray, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982) ("The statute contemplates that a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on. Had the Legislature desired to include participants within the definition, the phrase 'of others' might have been excluded or changed to 'of others or with others'.").

130. *See* Dickerson v. Raphael, 601 N.W.2d 108 (Mich. 1999).

131. *See, e.g.,* Lewis v. LeGrow, 670 N.W.2d 675, 683–84 (Mich. Ct. App. 2003) (following *Sullivan* explicitly); People v. Lucas, 470 N.W.2d 460, 472 n.19 (Mich. Ct. App. 1991) (same); *see also* Jonathan Turkel, *When Words Come Back to Haunt You: A Primer on the Use and Admissibility of Surreptitiously Recorded Conversations in Civil Cases*, 87 MICH. B. J., Oct. 2008, at 26, 28 (2008) ("The Michigan Court of Appeals has reaffirmed the *Sullivan* rationale, but the Michigan Supreme Court has expressly reserved ruling on its soundness" (citations omitted)).

Court of Appeals' interpretation of "discourse of others" eviscerates the explicit all-party consent requirement in the state. In this way, it does not matter what rationales the Michigan legislature considered when adopting the requirement because the courts and modern technology have effectively read it out of the statute.

4. New Hampshire

New Hampshire draws a similar distinction between a third party recording a conversation and a participant doing the same. But while one is illegal and one legal in Michigan, both are illegal in New Hampshire: A third party's recording is a felony,[132] while a participant's recording is only a misdemeanor.[133] This distinction reflects a concern for the consent of the participants being recorded, since people may expect their conversations to be repeated by the person to whom the statements are made, but not by third parties outside the conversation. While this might suggest a broad application of the all-party consent requirement in New Hampshire, state courts have recently acted to insert into the law some sensitivity to the nature of the conversation.

The New Hampshire Supreme Court, for example, has in recent years taken a broad view of consent, considering external factors outside those reflecting how people express themselves. In two recent cases involving the question of whether a defendant consented to the recording of online instant messaging communications, the court has made this approach especially clear. In *State v. Lott*, decided in 2005, the court found that the defendant had consented because "persons using an instant messaging program are aware that their conversations are being recorded."[134] Thus consent can be inferred based purely on the type of communication used; this approach resembles the doctrine of implied consent that Massachusetts courts have developed.[135]

However, in *State v. Moscone*, decided in 2011, the New Hampshire Supreme Court relied on *Lott* to find consent even when the defendant told the person with whom he was communicating to "delete [her] archives,"[136] suggesting that even though the type of conversation *could* be recorded, the defendant did not expect this particular one to be. However, the court decided that because "the

132. *See* N.H. REV. STAT. ANN. § 570-A:2(I) (2011).
133. *See* § 570-A:2(I-a).
134. State v. Lott, 879 A.2d 1167, 1171 (N.H. 2005).
135. *See* Part I.C.2, *supra*.
136. State v. Moscone, 13 A.3d 137, 145 (N.H. 2011).

messages were capable of being recorded,"[137] he had consented nonetheless. This shifts the inquiry from the determination of subjective consent to a pure consideration of the medium of conversation; once the court found that the instant messages were recordable, it effectively found that the defendant had consented to such recording because the conversation was no longer private. While it seems unlikely the court would extend the analysis so far, there seems to be little preventing reliance on *Moscone* to find that because any conversation is capable of being recorded by an ordinary cell phone, consent can always be implied even if explicitly denied.

The New Hampshire Supreme Court's interpretation of the state's wiretapping statute also suggests that the distinction between the two rationales for the all-party consent rule may begin to blur. As *Moscone* shows, the fact that the statutory structure reflects a concern for autonomy, as is implicit in this state's all-party consent requirement, did not prevent state courts from shifting the analysis to the medium of the conversation. In other words, even if a legislature focuses on only one rationale, state courts may well supply the other. This potential blurring of the two rationales, along with the fact that some states explicitly rely on both, explains why any exception for the all-party consent requirement should satisfy both rationales. Otherwise, the scope of the exception may not accurately match the policy rationales states use in justifying the rule.

II.
THE RIGHT TO RECORD STATE ACTION

Before considering the appropriate extent of an exception to the all-party consent rule, it is first necessary to determine the source of such an exception. Scholars have offered various First Amendment foundations for the existence of a constitutional right to record police activity.[138] Recent circuit court decisions have held such a right exists in some form under the First Amendment.[139]

137. *Id.*

138. For a summary of the five arguments—which include inherently expressive activity; the Free Press Clause; the right to gather information; the public's right to receive information; and prior restraints—see Michael Potere, *Who Will Watch the Watchers?: Citizens Recording Police Conduct*, 106 Nw. U. L. Rev. (forthcoming 2012) (manuscript at 36), *available at* http://ssrn.com/abstract=1837718. Choosing among the five theories is well beyond the scope of this Note.

139. *See* ACLU of Ill. v. Alvarez, No. 11-1286, slip op. at 34 (7th Cir. May 8, 2012) (holding that the Illinois eavesdropping statute "interferes with the gathering and dissemination of information about government officials performing their duties in public" and is therefore subject to First Amendment scrutiny); Glik v.

Depending on the currently unknown extent of First Amendment protection, legislative involvement may nonetheless prove necessary in order to establish the bounds of the exception to the all-party consent rule. If the right to record police activity is ultimately not protected by the First Amendment, exceptions to the all-party consent requirement will have to come from the legislature. While reliance on legislation has the disadvantages of piecemeal, state-by-state applicability[140] and inevitable delay,[141] it also has the advantage of allowing an exception's contours to be determined by policy rather than constitutional doctrine. If the First Amendment protects the right of citizens to record their interactions with police officers, it may not allow citizens to record a host of other state actors similarly exercising state authority in public.[142] Yet Judge Plitt's observation in *Graber* that "[t]hose of *us* who are public officials . . . are ultimately accountable to the public"[143] suggests that an exception to the all-party consent requirement should extend beyond police officers to include other state actors. If the First Amendment right to record is limited to police officers, a broader statutory exception would be necessary to supplement the amendment's incomplete protection. Conversely, if the First Amendment reaches beyond police officers, the contours of the constitutional exception must still be defined.[144]

Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (holding that "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment").

140. Recall that the state attorney who prosecuted Anthony Graber did so to incentivize the Maryland state legislature to change its state law. *See* Fenton, *supra* note 20.

141. At the time of this writing, no changes to the Maryland law have been made.

142. *See* Potere, *supra* note 138, at 21 (discussing qualified immunity protections for state officials).

143. State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *15 (Md. Cir. Ct. Sept. 27, 2010) (emphasis added).

144. In *Glik*, the First Circuit found that the plaintiff had the right to record public officials in part because he was in the middle of the Boston Common, "the oldest city park in the United States and the apotheosis of a public forum." *Glik*, 55 F.3d at 84. Had the recording occurred during a traffic stop, as in Anthony Graber's case, the court expressed far less conviction that the First Amendment would protect the activity. *Id.* at 85 (noting that "a traffic stop is worlds apart from an arrest on the Boston Common"). Thus even *Glik*'s seemingly broad First Amendment protection may not cover every situation in which the application of the all-party consent requirement seems inappropriate. The question of what geographic areas would be covered by an exception will be considered in full in Part II.C, *infra*.

Writ broadly, the all-party consent rule expresses concern for both the private nature of a conversation and the consent of the participants. Any effective exception must therefore overcome both concerns. Anthony Graber's prosecution seems so outlandish in part because recording police officers performing their official duties on public highways overcomes both concerns easily. First, the nature of the conversation clearly was not private. Police officers, whose authority to exercise the state's power is restricted only by personal discretion, are not engaged in "private" conversations when they interact with citizens while carrying out official duties.[145] Additionally, by not incorporating any element of affirmative consent into the state wiretapping statute, the Maryland legislature effectively consented on behalf of the officer who pulled Graber over. When functioning as state actors, police officers have no individual or personal privacy to invoke; they cannot deny the state's consent to recording and transparency.[146] Thus it is the *combination* of a public official performing a public duty in a public forum that makes the *Graber* outcome seem intuitively obvious.

The ultimate breadth of an exception to the all-party consent requirement depends on the individual scopes of these three factors. Each should be considered individually.

A. Public Officials

Because they exercise the state's power to deprive citizens of their liberty, police officers are quintessential public officials, who—at least in the First Amendment context—include all public employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[147] If one assumes public officials' conversations in the course of their public duties conducted in a public forum can be recorded, a natural question arises: who counts as a public official?

145. *See* William H. Rehnquist, *Is an Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement?: Or; Privacy, You've Come a Long Way, Baby*, 23 U. KAN. L. REV. 1, 8 (1974) ("An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.").

146. *Accord* Potere, *supra* note 138, at 16 ("Police officers acting within their official capacity are generally afforded a diminished expectation of privacy.").

147. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

"Public official" might be defined through analogy to the agency principles that underlie the state action doctrine.[148] Thus police officers could be seen as public officials because they are agents of the state. Yet this conception of public officials is overbroad because it would also include anyone else who can be characterized as a state actor, including low-level civil-service employees—like mail carriers—who perform their official duties in public and yet do not wield the state's power like police officers. Rather than exercising the state's police power to deprive citizens of their liberty, these employees perform administrative functions, and this fundamental distinction undermines the justification for exempting them from the all-party consent requirement. First, interpreting public officials to include employees like mail carriers would not satisfy the all-party consent requirement's interest in protecting private conversations; a conversation with a mail carrier about the citizen's private mail would most likely not relate to a task for which the mail carrier has any discretion that needs to be checked.[149] Second, such an application of the exception cannot meet the all-party consent requirement's interest in protecting the autonomy of the individual. Police officers implicitly consent to recording by accepting the vast discretion conferred upon them by the state. Their status as public officials thus comes not only through their exercise of state power, but also through the state's trust that they will exercise sound discretion in using that power. Since the state entrusts civil-service employees with less discretion, less oversight of their activities is necessary.

Even clerks who distribute public benefits based on neutral and objective criteria should not be exempted from the all-party consent rule. Even though they exercise the state power of deprivation—here in denying benefits rather than liberty—they accomplish this end without making any discretionary decisions. There is no need for an additional check on their power through citizen recording since all clerks should make the same objective determinations given the same neutral data. Additionally, administrative proceedings and the democratic process offer the public the

148. *See* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1785 (2010) ("[P]rivate individuals are principals, entitled to act to pursue their own interests, whereas government decisionmakers are agents, whose function is to further the interests of the citizens.").

149. Recall that rationales based on the nature of the conversation tend to intermingle with concerns about regulating police activity. *See* Part I.B.5, *supra*. This suggests that what makes a conversation with a police officer not private is the public's interest in ensuring that police power is not wielded irresponsibly.

chance to question the determinations made by all benefit-clerks. Therefore, in this case, the individual right to refuse recording need not be subordinated to the collective need to monitor state action.

If police officers—who have almost unlimited discretion to assert a high level of authority—form one end of the public official spectrum, civil-service employees form the other end, and the category of public officials exempted from the all-party consent requirement must balance these two poles. Finding that the individuals in question are state actors may factor into whether they are public officials for the purpose of an exception to the all-party consent requirement, but this determination can only form a threshold inquiry.[150] The remainder of the inquiry should focus on whether this state actor exercises a reasonable amount of discretion. Such an inquiry will ensure that the exception is not applied to individuals whose power can be checked through existing democratic mechanisms.

The main drawback of this approach to defining public officials is that it would not cover a group of individuals who exercise discretion in dealing with public issues, but are nonetheless considered private actors under the state action doctrine. For example, in cases questioning the applicability of the Fourth Amendment's limits on police searches and seizures, a majority of federal jurisdictions have found that bounty hunters (or bail enforcement agents who track down fugitives for monetary reward) are not state actors.[151] While such a holding allows bounty hunters to exercise even broader discretion when gathering evidence than police officers are allowed, it would prevent their public evidence gathering from being recorded without their consent, even when it is in public view. In this way, the state action trigger to the determination of whether the actor is a public official is problematic because it would limit the public's opportunity to document public life in precisely the situations where constitutional safeguards are at their lowest ebb.

150. However, for states that adopted the all-party consent requirement purely to protect the nature of the conversation in question, this inquiry could form the complete test because it would weed out those conversations that are private compared to those which are public.

151. *See* Adam M. Royval, Note, United States v. Poe: *A Missed Opportunity to Reevaluate Bounty Hunters' Symbiotic Role in the Criminal Justice System*, 87 DENV. U. L. REV. 789, 789 (2010). The Tenth Circuit held that bounty hunters are not state actors in 2009. *See* United States v. Poe, 556 F.3d 1113, 1117 (10th Cir. 2009).

However, if a problem exists here, it lies with the first-order determination that bounty hunters are not state actors, not the second-order application of that decision to an all-party consent requirement exception. Since bounty hunters are not state actors in most circuits, their actions are not subject to constitutional constraints. Private individuals have no obligation to obey the Constitution's commands,[152] so the public has no cognizable ability to incentivize bounty hunters to follow the contours of the Fourth Amendment. Thus the social desire to record as a means of deterring inappropriate conduct has no relevance without state action of some kind. Using state action to trigger the public official prong of an exception to the all-party consent requirement would therefore not encompass people like bounty hunters. The all-party consent requirement would apply to them unless and until they were determined to be state actors against whom the Constitution can be enforced.

Overall, then, the group of public officials to be exempted from the all-party consent requirement should be state actors whose agency relationships involve the exercise of discretion when they deprive citizens of liberty, property, or the like. When these conditions are met, the state should be able to consent to recording on behalf of the individuals who wield discretionary state power. The recording of such an official performing a public duty in a public forum should be exempted from any all-party consent requirement.

B. Public Duties

Not every act of a public official in a public forum involves a public duty. When a police officer buys a cup of coffee, he or she is not engaging with the public in the same way as when making an arrest or issuing a traffic ticket. The former is arguably a private act because the officer is not exercising the authority granted to him or her by the state, while the latter occurs in the course of the officer's job responsibilities to protect the community. Since only an action in the course of a public duty can potentially spark the kinds of constitutional violations that citizen recording is meant to deter,[153] only actions in the course of a public duty should trigger an exception to the all-party consent requirement. Otherwise, like the bounty hunter problem above, an exception could be used to deter wholly legal activity.

152. *See* BeVier & Harrison, *supra* note 148, at 1769.

153. *See id.* at 1791–92 (noting that the state action exists when government actors act as agents of the government, not when individuals acting as private citizens are supported by the state).

Unlike an individual's status as a public official—which inherently implicates the scope of that individual's autonomous decision making—the range of that official's public duties merely distinguishes among specific interactions that individual has with the public. Thus the public duty question only asks whether an exception to the all-party consent requirement would apply in certain situations, not whether the state should have the ability to consent on the public official's behalf. An exception to the all-party consent requirement that hinges partly on the performance of a public duty would imply that—unlike actions taken for private purposes—acts in the course of a public duty are not the type of conversations the requirement seeks to protect.

But what does it mean for an act to be in the course of a public officer's public duties? Even the act of buying a cup of coffee could be seen as public if the police officer is on duty at the time, receiving pay from a tax-funded budget. Such a broad definition of public duties would make it possible to record public officials any time they are being paid by the state and in a public forum. This approach would allow citizen recording of public officials in the greatest number of circumstances. However, there are two problems to defining an officer's public duties broadly, suggesting that the scope of allowable recording should be narrowed.

First, the social value of recording a police officer engaging in non-police activity is less than the value of comparable recordings of officers wielding state power. The difference comes from the kinds of inappropriate activity the two kinds of recordings can potentially reveal. When police officers make arrests, for example, their legitimate course of conduct is defined by constitutional norms, and surreptitious recording of their actions seeks to deter unconstitutional noncompliance. However, when public officials engage in public activity not connected to their roles as state actors, no constitutional baseline exists. While recording in this context could reveal inefficiencies in the use of state power—police officers taking too many breaks, for example—the question of how state resources are spent is more nuanced than the question of whether individual rights are violated. Recorded evidence of a public official's misdeed while exercising state power can be dispositive of a violation of individual rights, while evidence of inefficiency must be aggregated to be consequential. The public value of a single recorded instance of a public official's private conduct is therefore

less than the value of a recording depicting the exercise of state action.[154]

Second, even if recordings of the private conduct of public officials were considered valuable enough, the "on the clock" trigger of an official's public duties is becoming increasingly difficult to identify and may soon effectively disappear entirely as a legal distinction. In *City of Ontario v. Quon*, the Supreme Court considered whether a police department's review of personal messages sent on a SWAT team member's department-issued pager constituted an unconstitutional search under the Fourth Amendment.[155] During oral arguments, Chief Justice Roberts tried to distinguish between pager messages sent while Quon was on duty and when he was not, because the police department had only reviewed messages Quon sent during working hours.[156] However, the attorney representing Ontario argued that SWAT team members were issued pagers because they were "on duty . . . 24/7."[157] In response, Justice Scalia noted that "if they were on duty 24/7, there weren't any off-duty messages, were there?"[158] According to the official transcript of the oral arguments, Justice Scalia's quip was followed by laughter,[159] highlighting the absurdity of the idea that an employee can be considered on duty all the time simply by virtue of being issued a device to facilitate communication outside of business hours. But the lawyer's argument hints at the subtle point that advances in technology are blurring the line between work and private life across a wide scope of industries.

When one works as a public official, this blurring is especially problematic since different constitutional rules apply when officials function as state actors and as private individuals. In his opinion for

154. Of course, the issue is complicated somewhat by the fact that aggregated recorded evidence of the inefficient use of public resources could at some point prove widespread misuse. However, to avoid the fallacy of substituting anecdotes for empirical evidence, the number of recordings to be aggregated would have to be so large that it seems to pose a practical impossibility.

155. *See* City of Ontario v. Quon, 130 S. Ct. 2619, 2624 (2010) ("This case involves the assertion by a government employer of the right . . . to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by . . . the Fourth Amendment.").

156. *See* Transcript of Oral Argument at 15, City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (No. 08-1332) (statement of Chief Justice Roberts) ("Well, you don't have to look at the messages to determine that with respect to the off-duty messages, right?").

157. *Id.* (statement of Kent L. Richland).

158. *Id.* at 16 (statement of Justice Scalia).

159. *See id.*

the Court, Justice Kennedy did not decide this specific issue because he worried about the unforeseen consequences of a broad holding in an area of law affected by rapid technological developments.[160] Since the availability of technology affects "what society accepts as proper behavior,"[161] the Court effectively deferred to cultural norms to delineate between when employees are on-call and off-duty.

The same issues are present in considering the scope of an exception to the all-party consent requirement. If the concept of public duty is a blunt status determination based on whether the public official is on the job, the gradual merging of work into private life will make it next to impossible to limit the exception effectively. And the march of technology can only make the problem more pronounced as personal recording equipment becomes more prevalent and less expensive.

Instead of using an "on the clock" conception of a public official's public duty, the scope of that duty should be narrowed to only those instances in which public officials exercise the state power assigned to them. Such a definition mirrors the concept of *respondeat superior* in that it would only allow the state to authorize the recording of public officials without consent in the precise moments when those officials are acting as agents of the state.[162] This would both ensure the privacy of public officials when they engage in private actions during the workday and ensure that the public is able to record the use of state action even if made by an off-duty public official. Defining public duty based on whether a public officer in a public forum is engaging in state action will certainly create some doctrinal confusion, but if *Quon* is any guide, attempting to delineate based on whether an official is on duty or off duty will create even more.

C. Public Fora

Even if a public official is exercising a public duty, the physical location where the act takes place should affect the scope of an exception to the all-party consent requirement. Like the public duty issue discussed above, the public forum distinction affects the all-party consent requirement's concern for the private nature of certain conversations. The need for a geographic limit on an excep-

160. *See Quon*, 130 S. Ct. at 2630.

161. *Id.* at 2629.

162. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2011) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

tion is apparent when considering extreme positions on the continuum of public access to conversations involving public officials engaging in their public duties. At one end, when a police officer stops someone on a sidewalk, the location is clearly public because the public both has access to the location generally and can overhear the specific conversation taking place. The police officer also knows all this to be the case. At the other end of the spectrum, consider a conversation between two police officers in the station house that is secretly recorded. In that case, members of the public would be listening in on a conversation they ordinarily cannot hear, taking place in a location they ordinarily cannot access. The officers would have no notice of their "presence." Because the state could consent to recording on behalf of both officers,[163] the only rationale to prevent recording such a conversation is that the conversation itself is private.[164] An exception to the all-party consent requirement should therefore include some means to filter which conversations involving public officials engaging in public duties remain too private to be opened to citizen recording.

The clearest analogue to this issue in current law is the public forum doctrine in the Supreme Court's First Amendment jurisprudence. However, the analysis that led the Supreme Court to divide land into three categories for First Amendment purposes poses problems in the wiretapping context. For the purposes of wiretapping, all land should have the potential to be a public forum because a public official can wield state power anywhere.

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court developed a tripartite classification system for how the First Amendment applies to different geographical locations.[165] The first category consisted of "quintessential public forums" such as streets and parks, where the First Amendment prohibits almost all regulation

163. This flows from the theory that the state can exert special control over police officers by virtue of the fact that it employs them and grants them the power to exercise the state's authority. *Accord* Potere, *supra* note 138, at 16 ("Police officers acting within their official capacity are generally afforded a diminished expectation of privacy.").

164. This is especially the case when the conversation involves issues the public officials need to keep secret from the public in order to serve the public. Details about criminal investigations, for example, would fit this description. *See* Eric Lane, Frederick A.O. Schwarz Jr. & Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 740 (2010) ("[S]ecrecy may serve our constitutional commitment to individual rights by protecting the identities of individuals under investigation or by protecting personal data such as social security numbers.").

165. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

of speech beyond a narrow class of time, place, and manner restrictions.[166] The second category included all "public property which the State has opened for use by the public as a place for expressive activity,"[167] to which the same limits on regulation apply as in the first category.[168] The difference between the first two categories is thus not in the rules that apply to them, but how the forums come to exist: In the first category, the public forum exists because the location has traditionally been used for expressive activity,[169] while in the second category, the public forum exists because the state has actively allowed expressive activity to occur there.[170] The third category delineated a class of nonpublic forums, which included all other public property and can be regulated more strictly.[171] At issue in *Perry* was an interschool mail system, which the Court found to be a nonpublic forum that the school district could regulate by allowing its use by some private organizations but not others.[172]

Perry would clearly cover a substantial number of cases arising from an exception to the all-party consent requirement. When Anthony Graber was pulled over on a public highway, his interac-

166. *See id.* ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (citations omitted).).

167. *Id.*

168. *See id.* at 46 ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

169. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

170. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

171. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 46 ("Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

172. *See id.* ("The school mail facilities at issue here fall within this third category.").

tion with a Maryland state trooper occurred in a traditional public forum and so any exception to the all-party consent requirement would certainly apply. However, the Court's reasons for creating its three categories do not perfectly map onto the policy concerns that citizen recording poses. In *Perry*, the Court was concerned with the "right of access to public property,"[173] while in the context of an exception to the all-party consent requirement, the question is whether the conversation to be recorded is private.

This difference suggests that *Perry*'s concept of public fora alone is inadequate to form the basis of a recording exception. First, *Perry* only considers public property, and many interactions with public officials occur on private land. For example, a police search of a private home does not take place in any kind of public forum, yet individuals who let police officers into their homes may wish to record the ensuing interactions. The motivation for this type of recording—to ensure the search does not violate the Fourth Amendment—promotes the policy rationale for creating an exception to the all-party consent requirement generally. Thus these conversations should be considered as occurring in public fora, even though the land is privately owned. Even though the public at large does not have general access to the land, the individual who seeks to record does. This would allow an individual to record public officials engaging in public duties either when the individual owns the land or generally has access to it, which would open spaces like retail stores or office buildings to recording. Since the goal of an exception to the all-party consent requirement is to deter unconstitutional conduct on the part of public officials, it is appropriate to expand the concept of the public forum in this context. The alternative—to allow citizen recording of public officials only when land is publically owned—would create a regime that would make some recording criminal for reasons having nothing to do with the interaction being recorded. Instead, the same rules should apply regardless of whether the land is publically or privately owned.

Second, the privacy concern inherent in the all-party consent requirement suggests that *Perry*'s absolute classification of publically owned land as a public or nonpublic forum needs to be more flexible in the recording context. For example, police custodial interviews—which usually happen in a stationhouse—would be considered as occurring in a nonpublic forum under *Perry*. Yet the concern for police misconduct is as pronounced in this setting as

173. *Id.* at 44.

when police officers stop individuals on the street. Since many police departments record custodial interviews for their own records,[174] the issue mirrors the problem posed by the police recording stops via cameras on their cars but the law preventing those stopped from recording the police officers.[175] If the police stop and the custodial interview are different because the public has general access to the streets but not to the stationhouse, what unites them is the public's authorized presence in the specific location at the time of the recording.

Thus all land—whether publically or privately owned—should have the *potential* to be a public forum for the purposes of an exception to the all-party consent requirement. When public officials acting in the course of their public duties knowingly interact with private citizens, the land should then be considered a public forum. This broad approach would prevent the wholly secret recording of public officials when no private individuals are present, but allow it in most other circumstances. A private individual's presence with a public official would notify the official that the interaction could be recorded, deterring the inappropriate conduct that an exception to the all-party consent requirement seeks to stop.

D. Case-by-Case Exceptions

Even when public officials engage in public duties in public fora as described above, there may be some instances where state interests are nonetheless compelling enough to prevent citizen recording. In courtroom proceedings, for example, interactions between private citizens and judges may implicate the privacy rights of others in the courtroom, and if distributed, the recording may threaten a party's right to a fair trial.[176] The all-party consent requirement may also prove necessary during some police custodial interviews, when secrecy is necessary to investigate an unsolved

174. *See* Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 COLUM. J.L. & ARTS 107, 116 (2005) (noting that six states and the District of Columbia require custodial interrogations to be recorded and that "police and sheriff departments in at least 238 cities, counties and towns" require similar recording even without a state-level mandate).

175. Admittedly, the two situations are not perfectly analogous, since there is sometimes a strong need for secrecy in custodial interviews while police investigate unsolved crimes. However, this is the exception, not the rule.

176. For example, distributing recordings from a trial may prejudice the public against a criminal defendant. *See* William O. Douglas, *The Public Trial and the Free Press*, 46 A.B.A. J. 840, 844 (1960) ("[Mass opinion] is anathema to the very conception of a fair trial. It applies standards that have no place in determining the awful decision of guilt or innocence.").

crime. These kinds of instances suggest that an exception to the all-party consent requirement should not apply when a compelling state interest counsels against the recording of conversations that might otherwise fit the exception. Because the use of such an exception to the exception would hinge on the specific facts and balancing the state interests against the public's interest in recording, it could only be applied in an ad hoc, case-by-case manner. But the enforcement of the all-party consent requirement must be available in the narrow class of instances involving public officials exercising public duties in public fora where it is truly necessary.[177]

CONCLUSION

The all-party consent requirement to recording a conversation can protect privacy from two angles. First, by focusing on the nature of the conversation to be recorded, the requirement ensures that communications of a certain type are not recorded. Second, by focusing on the explicit or implicit consent of a conversation's participants, the requirement ensures that people are not recorded without their knowledge. However, both of these concerns decrease when the non-consenting party is a public official engaged in a public duty in a public forum. At the same time, the public's interest in recording increases in those situations, as memorializing these conversations can deter official misconduct generally and document specific misconduct should it occur. Because the benefits of citizen recording of public officials engaging in public duties in public fora outweigh the lessened concerns for privacy, these situations should be exempted from the all-party consent requirement's recording ban. The ease with which recording can now be accomplished has led many police departments to record more of their officers' interactions with the public; the accuracy of recorded evidence, while not perfect, is generally an improvement over traditional word-of-mouth. Developments in personal technology have made citizen recording as feasible as that which is conducted by the state. When it depicts public officials engaging in their public duties in public fora, it should receive the same legal treatment.

177. The use of such an exception to the exception should be narrow because government transparency and the deterrence of official misconduct are compelling interests in and of themselves that support a broad acceptance of citizen recording. So to prevent that recording from taking place, the asserted state interests must be both compelling in their own right and important enough to outweigh compelling reasons for allowing citizen recording.

CONSUMERS OF GENERIC DRUGS SEARCH FOR COMPENSATION: THE EFFECT OF *PLIVA V. MENSING* ON THE *CONTE/FOSTER* DICHOTOMY

*CLIFFORD M. LANEY**

INTRODUCTION

In *PLIVA v. Mensing*, the Supreme Court held that federal drug regulation[1] preempts state law claims against manufacturers of generic drugs for failure to adequately warn consumers of potential harms faced by taking those drugs.[2] Consumers of generic drugs injured by inadequate warnings are now left searching for an alternative means of recovery.[3] One potential alternative for these consumers is to bring a claim against the manufacturer of the name-

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1. 21 U.S.C. § 355(j)(2)(A)(v) (2006).

2. PLIVA v. Mensing, 131 S. Ct. 2567, 2572 (2011).

3. *See id.* at 2592 (Sotomayor, J., dissenting) ("[T]he majority's pre-emption analysis strips generic-drug consumers of compensation when they are injured by inadequate warnings.").

brand counterpart of the generic drug that caused their injuries.[4] Courts will almost certainly see a greater number of these claims by users of generic counterparts as a result of *PLIVA's* elimination of liability against generic manufacturers.[5] While this could give name-brand defendants some cause for concern,[6] courts have until now almost universally rejected the validity of these claims.[7] *Foster v. American Home Products* was the first and most widely followed case to directly address and reject this type of claim.[8] The *Foster* approach is not uniformly followed, however, as claims against name-brand manufacturers were allowed in *Conte v. Wyeth*.[9] Despite the likely increase in claims against brand-name manufacturers brought by consumers of generic drugs as a result of *PLIVA*, reconsideration of *Foster* or widespread adoption of the *Conte* approach is unlikely, and plaintiffs will remain restricted by the barrier *Foster* erected. While *Conte's* reasoning is only strengthened by *PLIVA's* holding, judicial change is unlikely because the *Foster* decision is based on a fundamental understanding of products liability law. Understanding the practical ramifications of *PLIVA* in this regard can provide guidance to litigators and motivation for any legislatures that wish to address any existing inequity for consumers of generic drugs.

4. *See* Conte v. Wyeth, 85 Cal. Rptr. 3d 299, 304-05 (Cal. Ct. App. 2008) (upholding claims of fraud, fraud by concealment, and negligent misrepresentation against a name brand manufacturer for injuries suffered by consumer of generic drugs).

5. Some evidence of resurgence is seen in *Gross v. Pfizer, Inc.*, where the plaintiffs petitioned for reconsideration of an adverse summary judgment following *PLIVA*. Gross v. Pfizer, Inc., No. 10-CV-00110-AW, 2011 WL 4005266, at *2 (D. Md. Sept. 7, 2011).

6. *See* Michael Healy & Kelly Savage Day, From the Experts: Brave New (Post-Mensing) World, CORPORATE COUNSEL (Aug. 10, 2011), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202510496208&From_the_Experts_Brave_New_PostMensing_World ("Although *PLIVA* should not be viewed as a harbinger of never-ending, ever-expanding liability for brand-name manufacturers, innovators should expect and prepare for an increase in product liability suits seeking to hold them liable for harm stemming from their generic competitors' products . . . .").

7. *See, e.g.*, Foster v. Am. Home Prods. Corp., 29 F.3d 165, 171-72 (4th Cir. 1994); Stanley v. Wyeth, Inc., 991 So. 2d 31, 34-35 (La. Ct. App. 2008). *But see* Kellogg v. Wyeth, 762 F. Supp. 2d 694, 708–09 (D. Vt. 2010); *Conte*, 85 Cal. Rptr. 3d at 305.

8. *See Foster*, 29 F.3d at 171-72. *Foster* has been widely adopted. *See infra* note 27.

9. *Conte*, 85 Cal. Rptr. 3d at 320-21 ("We hold that Wyeth's common-law duty to use due care in formulating its product warnings extends to patients whose doctors foreseeably rely on its product information when prescribing metoclopramide, whether the prescription is written for and/or filled with Reglan or its generic equivalent.").

This Comment begins by describing two contrasting judicial approaches to the liability of brand-name manufacturers to the consumers of their generic equivalents. The Comment next discusses application of the preemption doctrine in the prescription drug and device context, most recently in *PLIVA v. Mensing*. Finally, this Comment discusses the ramifications of *PLIVA v. Mensing* on the liability of brand-name manufacturers and concludes that courts are unlikely to provide a judicial remedy for consumers of generic prescription drugs alleging a failure to warn.

I.
THE *FOSTER/CONTE* DICHOTOMY

When seeking FDA approval, generic drugs piggyback on the more rigorous approval process undergone by their name-brand counterpart. Generic drugs are eligible for an abbreviated FDA approval process if their manufacturers, among other things, precisely copy the warnings of their name-brand equivalent. This piggybacking raises the potential for a claim by consumers of the generic drug against the name-brand manufacturer.[10] Such a claim would be based on the reliance of consumers of generic drugs or their prescribing physicians on representations made by the name-brand manufacturer.[11]

For this claim to succeed, two propositions must be accepted. First, a claim for intentional or negligent misrepresentation must be separate and distinct from strict products liability claims, since strict products liability claims require that the defendant manufactured the product at issue.[12] Second, name-brand manufacturers must be found to owe a duty of care to consumers of generic drugs.[13] Such a duty would be based on the foreseeability of a doctor prescribing the generic drug in reliance on representations

10. Generic drug manufacturers are able to file for abbreviated new drug applications under 21 U.S.C. 355(j). This section provides that if a generic manufacturer can show that their proposed product is equivalent to a product whose conditions of use have previously been approved, § 355(j)(2)(A)(i), the strength of the new drug is the same, § 355(j)(2)(A)(iii), their drug is bioequivalent to said approved drug, § 355(j)(2)(A)(iv), and the labeling is the same as the previously approved drug, § 355(j)(2)(A)(j)(v), then approval of the new drug shall be granted or denied within 180 days. § 355(j)(5)(A).

11. *See Conte*, 85 Cal. Rptr. 3d at 304–05.

12. *Foster*, 29 F.3d at 168 ("Maryland law requires a plaintiff seeking to recover for an injury by a product to demonstrate that the defendant manufactured the product at issue.").

13. *See id.* at 171 ("The Fosters' negligent misrepresentation action against Wyeth also fails because Wyeth is under no duty of care to the Fosters.").

made by the name-brand manufacturer.[14] Both of these propositions were rejected in *Foster v. American Home Products* but accepted in *Conte v. Wyeth*.[15] The following section discusses both cases in detail.

A. Foster v. American Home Products *and Its Progeny*

Foster v. American Home Products held that name-brand manufacturers cannot be liable for injuries caused to consumers of generic drugs by inadequate labeling.[16] In *Foster*, two twins were given promethazine syrup, a generic form of Phenergan, as treatment for colic.[17] After receiving the treatment for several days, one of the twins perished from Sudden Infant Death Syndrome.[18] This death was attributed to the promethazine syrup prescribed by the Fosters' pediatrician,[19] and a suit was brought against the name-brand manufacturer, Wyeth.[20] The court rejected this potential liability of name-brand manufacturers. First the court held that, under Maryland law, negligent misrepresentation claims against manufacturers of injury-causing products are subsumed within products liability law.[21] Because a defendant must have manufactured the product at issue to be liable under a products liability claim, a negligent misrepresentation claim against a name-brand manufacturer is invalid when the consumer has taken only the generic drug.[22] Next the court held that name-brand manufacturers owe no duty of care to consumers of generic drugs.[23]

14. *See Conte*, 85 Cal. Rptr. 3d at 311–13 (holding that name-brand manufacturers do owe a duty to consumers of generic drugs after finding that "it is eminently imminently foreseeable that a physician might prescribe [a generic equivalent] in reliance on" representations of the name-brand manufacturer); *see also Foster*, 29 F.3d at 171 ("The Fosters contend that a duty exists in this case because it was foreseeable to Wyeth that misrepresentations regarding Phenergan could result in personal injury to users of Phenergan's generic equivalents.").

15. *Compare Foster*, 29 F.3d at 171-72, *with Conte*, 85 Cal. Rptr. 3d at 311–13.

16. *Foster*, 29 F.3d at 171-72.

17. *Id.* at 167.

18. *Id.* ("The autopsy report attributed Brandy's death to Sudden Infant Death Syndrome ('SIDS').").

19. *Id.* ("A pediatrician from the Maryland SIDS Center at the University of Maryland opined that Brandy's death was caused by the promethazine.").

20. *Id.*

21. *Id.* at 168.

22. *Foster*, 29 F.3d at 168.

23. *Id.* at 170 ("There is no legal precedent for using a name brand manufacturer's statements about its own product as a basis for liability for injuries caused by other manufacturers' products, over whose production the name brand manufacturer had no control.").

Since the claim in *Foster* was against a name-brand manufacturer, it was unnecessary for the court to evaluate the preemption of claims against generic manufacturers; nevertheless, the *Foster* court denied in dicta the existence of any preemption defense for generic manufacturers.[24] In the *Foster* court's opinion, generic manufacturers, as experts, are responsible for the accuracy of their labels, and therefore are subject to the threat of liability.[25] The *Foster* court also found no congressional intent to preempt claims against generic manufacturers.[26]

The *Foster* opinion has been widely adopted and endorsed by other courts taking a strong position against any possibility of holding name-brand manufacturers liable for injuries caused by their generic equivalents.[27] A Florida court, for example, stated: "[I]t is axiomatic that every manufacturer is responsible for harm caused by its own products, in and out of the pharmaceutical industry."[28] Other courts have rested similar decisions on state legislation that restricts "'all actions brought for or on account of personal injury, death, or property damage caused by or resulting from the . . . warning, instruction, marketing, packaging, or labeling of any product'" to a product liability action requiring that the product at issue be manufactured by the defendant.[29]

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24. *Id.* at 169.

25. *Id.* at 170.

26. *Id.*

27. *See*, *e.g.*, Mensing v. Wyeth, Inc., Civ. No. 07-3919 (DWF/SRN), 2008 WL 4724286, at *4 (D. Minn. Oct. 30, 2008) ("The Court finds *Foster* persuasive."), *aff'd*, 588 F.3d 603 (8th Cir. 2009), *rev'd sub nom.*, PLIVA v. Mensing, 131 S. Ct. 2567 (2011) ("The Court finds *Foster* persuasive."); Sheeks v. Am. Home Prods. Corp., No. 02CV337, 2004 WL 4056060, at *2 (D. Colo. Oct. 15, 2004) (agreeing with the reasoning in *Foster* for claims of both negligent representation and products liability); Stanley v. Wyeth, Inc., 991 So. 2d 31, 34 (La. Ct. App. 2008) ("As noted in *Foster*, a manufacturer cannot reasonably expect that consumers will rely on the information it provides when actually ingesting another company's drug."); *see also* Colacicco v. Apotex, Inc., 432 F. Supp. 2d 514, 538–39 (E.D. Pa. 2006), *aff'd sub nom.* Colacicco ex rel Estate of Calacicco v. Apotex Inc., 521 F.3d 253 (3d Cir. 2008), *vacated*, 129 S. Ct. 1578 (2009) ("[W]e hold that a name brand drug manufacturer does not owe a legal duty to consumers of a generic equivalent of its drug . . . .").

28. Sharp v. Leichus, No. 2004-CA-0643, 2006 WL 515532, at *4 (Fla. Cir. Ct. Feb. 17, 2006), *aff'd*, 952 So. 2d 555 (Fla. Dist. Ct. App. 2007) (per curiam). The *Sharp* court's holding was conditioned on finding "no case law, in or out of Florida, that eliminates a generic manufacturer's legal duty to its customers." *Id.*

29. *See* Neal v. Teva Pharms. USA, Inc., No. 09-CV-1027, 2010 WL 2640170, at *2 (W.D. Ark. July 1, 2010) (quoting ARK. CODE ANN. § 16-116-102(5) (2011)); *see also*, *e.g.*, Morris v. Wyeth, Inc., No. 09-0854, 2009 WL 4064103, at *2-5 (W.D. La. Nov. 23, 2009) (finding that Louisiana statute requires that in product liability suit

B. Conte v. Wyeth

Despite the widespread adoption of *Foster*, a California Court of Appeal in *Conte v. Wyeth* took the opposite position and found that the common law duty of care owed by name-brand manufacturers could extend to consumers of generic drugs where reliance is shown.[30] In *Conte*, the plaintiff alleged that her serious, irreversible neurologic condition was the result of long-term consumption of a generic prescription drug, metoclopramide.[31] Conte brought suit against Wyeth, the manufacturer of the name-brand equivalent of metoclopramide,[32] despite never having used the name-brand product.[33] The *Conte* court first held that misrepresentation claims were not subsumed under the requirements of products liability law, meaning liability for misrepresentation is not restricted only to the manufacturer of the product at issue;[34] therefore, liability could exist against a party that did not manufacture the specific injury-causing product. The court next held that the duty owed by name-brand manufacturers could extend to consumers of generic drugs.[35]

The appellate court in *Conte* did not discuss the question of preemption of claims against generic manufacturers.[36] Although the trial court had found that the claims against the generic manufacturer Purepac Pharmaceutical Company were preempted,[37] the Court of Appeals never addressed preemption because it upheld summary judgment in favor of Purepac on other grounds.[38] Consequently, it was able to avoid this issue.

The *Conte* decision has attracted a great deal of criticism for failing to characterize misrepresentation claims as subject to the requirements of products liability and for extending the duty of care

defendant must have manufactured the product); Sloan v. Wyeth, 2004 Extra Lexis 202, at *3–12 (N.J. Super Ct. Law. Div. Oct. 13, 2004) (citing the New Jersey Products Liability Act, N.J. STAT. ANN. § 2A:58C-1 (1987), as the exclusive remedy available to the plaintiffs).

30. Conte v. Wyeth, 85 Cal. Rptr. 3d 299, 320-21 (Cal. Ct. App. 2008).

31. *Id.* at 304.

32. *Id.* at 305.

33. *Id.*

34. *Id.* at 309-11.

35. *Id.* at 311. *Conte* found the extension of duty sensible based on "common sense" and California's common law. *Id.*

36. Conte v. Wyeth, 85 Cal. Rptr. 3d 299, 311 (Cal. Ct. App. 2008)

37. Conte v. Wyeth, Inc., No. CGC-04-437382, 2006 WL 2692469 (Cal. Super. Ct. Sept. 14, 2006), *aff'd on other grounds*, 85 Cal. Rptr. 3d 299 (Cal. Ct. App. 2008).

38. *Conte*, 85 Cal. Rptr. 3d at 319–20 (affirming summary judgment for generic defendants based on plaintiff's failure to show reliance).

owed by name-brand manufacturers too far.[39] Despite this criticism,[40] *Conte* has been called "the most careful and sophisticated consideration" of the issue addressed,[41] and a federal district court in Vermont has adopted the *Conte* position.[42]

39. *See, e.g.*, Lars Noah, *Adding Insult to Injury: Paying for Harms Caused by a Competitors Copycat Product*, 45 TORT TRIAL & INS. PRAC. L.J. 673, 684-93 (2010); James M. Beck & Mark Herrmann, *Generic Drug Pioneer Liability*, DRUG & DEVICE L. BLOG (Nov. 7, 2008, 4:10 PM), http://druganddevicelaw.blogspot.com/2008/11/generic-drug-pioneer-liabilty.html (predicting the potentially devastating effects of *Conte* given the lack of an "effective limitation on the scope of the [negligent misrepresentation] theory"); James M. Beck & Mark Herrmann, *More Thoughts On* Conte v. Wyeth, DRUG & DEVICE L. (Nov. 13, 2008, 4:52 PM), http://druganddevicelaw.blogspot.com/2008/11/more-thoughts-on-conte-v-wyeth.html; Melissa Maleske, *Brand-Name Burdens*, INSIDECOUNSEL (Feb. 1, 2009), http://www.insidecounsel.com/2009/02/01/brandname-burdens. Beck and Herrmann criticize Conte for two reasons. Beck & Herrmann, *More Thoughts On* Conte v. Wyeth, *supra*. The first is the "Lipstick On A Pig" fallacy, namely that if you put lipstick on a pig, this does not change the pig's true identity. *Id*. Beck and Hermann argue that the *Conte* court succumbs to this fallacy when it allows intentional/negligent misrepresentation claims to proceed against a non-manufacturer where a products liability claim would be unable to proceed. *Id*. They argue that this holding goes against the long-standing position of *Greenman v. Yuba Power* that "'[t]he purpose of [products] liability is to insure [sic] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market . . . .'" *Id*. (quoting *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963)). The second concern of Beck and Herrmann is that *Conte* has expanded foreseeability too far by holding that reliance upon "another manufacturer's warnings from much longer ago, read anywhere, trumps nonreliance [sic] on the warnings that came with the product that the doctor actually prescribed." *Id*. They provide a hypothetical supposedly analogous to the facts of *Conte* to demonstrate their perceived absurdity of the *Conte* decision. *See id*. In their hypothetical they argue that following *Conte*'s logic of foreseeability, if a family owns two cars with identical warnings and one vehicle is crashed, the family could sue the manufacturer of the other vehicle for inadequate warnings because it would be foreseeable that the driver of the crashed vehicle relied on the other vehicle's warnings. *Id*. Beck and Herrmann use the absurdity of this hypothetical to demonstrate their fear of *Conte*'s expansion of foreseeability. *Id*.

40. It should be noted that criticism of *Conte* is also noticeably defendant-sided, as Beck is counsel for Dechert LLP, http://www.dechert.com/james_beck/, and Herrmann was formerly a partner at Jones Day. *Above the Law, Above the Law Launches a New Column for In-House Counsel*, ABOVE THE LAW (Nov. 16, 2010), http://abovethelaw.com/2010/11/above-the-law-launches-a-new-column-for-in-house-counsel. Both of these firms are renowned for their defense of businesses in products liability suits. CHAMBERS & PARTNERS, CHAMBERS ASSOCIATE: THE STUDENT'S GUIDE TO LAW FIRMS 122, 194 (Cecilia Soler ed. 2011).

41. Allen Rostron, *Prescription For Fairness: A New Approach to Tort Liability of Brand-Name and Generic Drug Manufacturers*, 60 DUKE L.J. 1123, 1190 (2011).

42. Kellogg v. Wyeth, 762 F. Supp. 2d 694, 708–09 (D. Vt. 2010)

II.
PREEMPTION IN THE PRESCRIPTION DRUG AND DEVICE CONTEXT

Foster and *Conte*, although not expressly ruling on the issue, have different perspectives on the preemption of claims against generic manufacturers for inadequate warnings. In 2011, the Supreme Court settled this issue in *PLIVA v. Mensing* by finding these claims preempted by federal law.[43] This preemption decision by the Supreme Court may call into question the *Foster/Conte* dichotomy.[44]

A. Brief Overview of Preemption Doctrine[45]

Preemption is rooted in the Supremacy Clause of the Constitution, which states that "the Laws of the United States . . . shall be the supreme law of the land."[46] Under the Supreme Court's preemption doctrine, state laws are inapplicable where they are either expressly preempted by federal statute or where preemption is implied because either Congress has intended to occupy an entire field or a given state law "actually conflict[s] with the statute or federal standards."[47] Conflict can exist either where compliance with both the state and federal law is "a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[48]

B. Riegel v. Medtronic *and* Wyeth v. Levine*: First Looks at Preemption in the Prescription Drug/Device Context*

One of the first major Supreme Court cases addressing preemption in the drug/device context was *Riegel v. Medtronic*.[49] *Riegel* questioned whether "the pre-emption clause enacted in the Medical Device Amendments of 1976, 21 U.S.C. § 360k, bars common-

43. PLIVA v. Mensing, 131 S. Ct. 2567, 2572 (2011).

44. *See* Rostron, *supra* note 41, at 1135 ("[I]f the Supreme Court should find that federal law preempts claims against generic drug manufacturers, the question of whether brand-name drug makers can be liable to those who took generic drugs will take on greater significance than ever before.").

45. For a diverse array of scholarly perspectives on preemption, see generally PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William Buzbee ed., 2009).

46. U.S. CONST. art. VI, cl. 2.

47. Geier v. Am. Honda Motor Co. Inc., 529 U.S. 861, 868 (2000) (citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (internal quotation marks omitted)).

48. Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 228 (2000) (citations and internal quotation marks omitted).

49. 552 U.S. 312, 315 (2008).

law claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration (FDA)."[50] The Court found that common law claims were preempted under the Medical Device Amendments' express preemption clause.[51]

In *Riegel*, the plaintiff brought several state law products liability claims against the manufacturer of the balloon catheter that ruptured when used by his physician in an attempt to dilate his artery.[52] The defense argued that common law claims would create requirements different from and in addition to those that were created by the FDA after the extensive approval process required for Class III medical devices, and therefore the common law claims were preempted.[53] The Court adopted the defense's position, citing *Medtronic, Inc. v. Lohr*[54] for the proposition that common law causes of action for strict liability and negligence do impose requirements.[55] As requirements, these common law claims were preempted under §360k(a), which forbids any state from adopting requirements different from or in addition to any requirements of federal law applicable to the medical device.[56]

In a second case involving the conflict between a common law suit and FDA approval, *Wyeth v. Levine*, the Supreme Court held that common law claims against prescription drug manufacturers were not preempted.[57] From a legal standpoint, this case was identical to *Riegel* except that it involved a prescription drug instead of a medial device. However, this difference proved determinative because prescription drug legislation does not contain an express preemption clause, unlike §360k(a) in the medical device context.[58]

50. *Id.*

51. *Id.* at 330 (affirming the Second Circuit's finding of express preemption).

52. *Id.* at 320. The plaintiff brought a wide range of common law claims including strict liability, breach of implied warranty, and negligence in the design, testing, inspection, distribution, labeling, marketing, and sale of the catheter. *Id.*

53. Brief for Respondent at 12–13, Reigel v. Medtronic, 552 U.S. 312 (2008), (No. 06–179), 2007 WL 3082217.

54. 518 U.S. 470 (1996).

55. *Riegel*, 552 U.S. at 323-24 (citing *Lohr*, 518 U.S. at 512).

56. *Id.* at 330.

57. 555 U.S. 555, 581 (2009) (affirming the Vermont Supreme Court's holding that state law claims were not preempted).

58. *Id.* at 574 ("[D]espite its 1976 enactment of an express preemption provision for medical devices, *see* § 2, 90 Stat. 574 (codified at 21 U.S.C. § 360k(a) (2006)), Congress has not enacted such a provision for prescription drugs."). Beyond the relevance of this difference from an express preemption standpoint, the court also took the absence of an express preemption clause into account when considering whether a state law claim would be an obstacle to Congress's purpose

In *Wyeth*, Diana Levine brought suit against Wyeth after she was stricken with gangrene following administration of the drug Phenergan by I-V push.[59] A Vermont jury had found Wyeth liable for "fail[ing] to provide an adequate warning of that risk and awarded damages to respondent Diana Levine to compensate her for the amputation of her arm."[60] Wyeth appealed the jury verdict under the theory that Levine's claim was preempted because Wyeth could not comply with both state and federal law when designing its warning[61] and, in the alternative, that allowing a state law claim in this instance would be an obstacle to the accomplishment of Congressional objectives.[62]

The United States Supreme Court rejected both of Wyeth's preemption arguments and affirmed the holding of the Vermont Supreme Court.[63] It first denied Wyeth's impossibility argument because, under the "changes being effected" or "CBE" regulation,[64] manufacturers of drugs may update their labels to "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product" without waiting for FDA approval.[65] This regulation allowed Wyeth to change its label without being in violation of federal regulation as long as the change was in light of "newly acquired information."[66] The extent of newly acquired information is not limited to new data, but also encompasses "new analyses of previously submitted data."[67] Wyeth's ability to unilaterally change its la-

when discussing implied preemption. *Wyeth*, 555 U.S. at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history.").

59. *Id.* at 559.

60. *Id.* at 558.

61. *Id.* at 563. The impossibility claim was an attempt to apply the *Riegel v. Medtronic, Inc.* holding to prescription drugs despite the absence of an express preemption clause. *See* Brief for Petitioner at 31, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), 2008 U.S. S. Ct. Briefs LEXIS 458, at *49 ("Similar features of FDA's premarket approval of Class III medical devices recently led this Court to find preemption of state-law tort claims in that analogous context.") (citing Riegel v. Medtronic Inc., 552 U.S. 312 (2008)).

62. *Wyeth*, 555 U.S. at 563–64.

63. *Id.* at 581.

64. 21 C.F.R. § 314.70(c)(6)(iii)(A), (C) (2008).

65. *Wyeth*, 555 U.S. at 568 (quoting 21 C.F.R. § 314.70(c)(6)(iii)(A),(C) (2008)) (internal quotation marks omitted).

66. *Id.*

67. *Id.* at 569 (quoting Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices, 73 Fed. Reg. 49,603,

bels led the Court to find that it was not impossible for the company to comply with both state and federal law.[68]

The Supreme Court also held that Levine's claim was not preempted as an obstacle to the accomplishment of Congressional purposes.[69] The Court rejected Wyeth's contention that approval under the Federal Food, Drug, and Cosmetic Act[70] provides both minimum and maximum standards, so liability under state common law would necessarily upset that carefully struck balance.[71] In addition, the court gave weight to Congress' inclusion of a preemption clause in the medical device context, and the noticeable absence of such a provision for prescription drugs.[72] Finally, the court rejected Wyeth's contention that the agency must be presumed to have preempted state law because of the careful balancing of the risks and benefits of a specific label.[73] The court rejected this argument because of the FDA's traditional view that state law claims were complementary to the FDA's own regime.[74] Overall, the court was not convinced that state law claims would obstruct the purposes of federal regulation of drugs in this instance, and therefore concluded that Levine's claim was not preempted.[75]

III.
PLIVA V. MENSING: PREEMPTION IN THE GENERIC DRUG CONTEXT

A major question left unanswered by *Wyeth v. Levine* was whether state law claims would similarly be allowed to proceed against generic drug manufacturers. Although similarly subject to the approval of the FDA, generic drugs are subject to different standards[76] and are required to have the same labeling as the approved

49,604 (Aug. 22, 2008) (to be codified at 21 C.F.R. pt. 314) (internal quotation marks omitted)).

68. *Id.* at 571.

69. *Id.* at 581.

70. 21 U.S.C. §§ 301–399a (2006).

71. *Wyeth*, 555 U.S. at 573–74 ("The most glaring problem with [the floor and ceiling] argument is that all evidence of Congress' purposes is to the contrary.").

72. *Id.*

73. *Id.* at 575–77. This argument attempted to analogize FDA drug approval to the DOT's regulation in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864–65 (2000). In *Geier*, the Supreme Court held that a state lawsuit that would require the installation of air bags was preempted by the DOT's standard that allowed for a choice among various passive restraint devices. *Id.* at 886.

74. *Wyeth*, 555 U.S. at 580–81.

75. *Id.* at 581.

76. *See* 21 U.S.C. § 355(j) (2006).

name-brand drug.[77] *PLIVA v. Mensing* addressed the issue of preemption for generic drugs by holding that federal drug regulations preempt state-law claims against generic drug manufacturers for failure to adequately warn.[78] *PLIVA* was thought by some, including Justice Sotomayor in dissent in the case, to effectively rewrite the decision in *Wyeth v. Levine*[79] and was criticized for leaving an injured consumer's right to relief subject to the happenstance of whether the consumer was prescribed a generic or name-brand drug.[80]

In *PLIVA*, plaintiffs Gladys Mensing and Julie Demahy had been prescribed the name-brand drug Reglan.[81] However, as is common practice,[82] their prescriptions were filled with Reglan's generic equivalent.[83] After taking the drug as prescribed for several years, both women developed tardive dyskinesia, a severe neurological disorder.[84] The plaintiffs alleged that the risk of tardive dyskine-

77. *See* 21 U.S.C. § 355(j)(2)(A)(v).

78. PLIVA v. Mensing, 131 S. Ct. 2567, 2572 (2011).

79. *Id.* at 2582 (Sotomayor, J., dissenting).

80. *PLIVA*, 131 S. Ct. at 2583 (Sotomayor, J., dissenting); Erwin Chermerinsky, *A Devastating Decision*, TRIAL 55 (Sept. 2011) ("The Court's reasoning is questionable on many levels."); *see also* Alliance for Justice, *Worst Decision, #6:* PLIVA v. Mensing, JUSTICE WATCH (Sept. 23, 2011, 10:05 AM), http://afjjusticewatch.blogspot.com/2011/09/worst-decisions-6-pliva-v-mensing.html; Steven Berk, *Clarence Thomas*, PLIVA v. Mensing*, and the Plight of the Consumer*, THE CORPORATE OBSERVER (June 24, 2011, 3:23 PM), http://www.thecorporateobserver.com/2011/06/articles/in-the-courts/clarence-thomas-pliva-v-mensing-and-the-plight-of-the-consumer ("Clarence Thomas, once again jettisoning his longstanding principles to reach an expedient result, broadly interpreted federal preemption to cover a wider swath of claims."); Maxwell S. Kennerly, *The Most Unfair Prescription Drug And Medical Device Opinions Of 2011*, LITIGATION AND TRIAL (Jan. 3, 2012), http://www.litigationandtrial.com/2012/01/articles/attorney/consumer-protection/the-most-unfair-prescription-drug-and-medical-device-opinions-of-2011 (arguing that *PLIVA v. Mensing* is the most unfair prescription drug decision of 2011).

81. *PLIVA*, 131 S. Ct. at 2573. Reglan is the name-brand version of the drug Metoclopramide. "Metoclopramide injection is used to relieve symptoms caused by slow stomach emptying in people who have diabetes. These symptoms include nausea, vomiting, heartburn, loss of appetite, and feeling of fullness that lasts long after meals." Metoclopramide Injection, PUBMED HEALTH (Jan 1, 2010), http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000132/.

82. Jesse C. Vivian, *Generic-Substitution Laws*, U.S. PHARMACIST, Table 2 (June 19, 2008), http://www.uspharmacist.com/content/s/44/c/9787 (citing eleven states and Puerto Rico with mandatory generic substitution laws and thirty-eight states as well as Guam and D.C. with permissive substitution). Only Oklahoma prohibits substitution without the authority of the purchaser or prescriber. Vivian, *supra*. Thirty-eight states, Puerto Rico, and D.C. require notification or consent for substitution. *Id.* at Table 2.

83. *PLIVA*, 131 S. Ct. at 2573.

84. *Id.*

sia was greater than indicated on the label and therefore the generic manufacturers had failed to adequately warn of this danger.[85]

The manufacturer raised a preemption defense, arguing that it could not comply with both federal regulations and any alleged state tort-law duty.[86] Its argument relied on 21 U.S.C. § 355(j)(2)(A)(v), which states that a generic manufacturer must have labeling that is the same as that of the name-brand drug.[87] It therefore argued that the generic manufacturer's exclusive responsibility is "ensuring that its warning label is the same as the brand-name's."[88]

The dispute in *PLIVA* was whether and to what extent generic manufacturers may change their labels after initial approval.[89] The FDA's view was that manufacturers of generic drugs have an ongoing duty to ensure that their labeling is identical to their name-brand counterpart's.[90] As a result, the FDA denied the generic manufacturer's ability to unilaterally change its labels with the CBE process that was available to Wyeth in *Wyeth v. Levine*.[91] The FDA nonetheless argued that claims against generic drug manufacturers should not be preempted. The Supreme Court deferred to the FDA's interpretation of the availability to *PLIVA* of the CBE,[92] citing *Auer* deference.[93]

Despite deferring to the FDA's interpretation of the CBE regulation, the Supreme Court did not adopt the FDA's position on pre-

85. *Id.*

86. *Id.*

87. *Id.* at 2574 (citing 21 U.S.C. § 355(j)(2)(A)(v) (2006)).

88. *PLIVA*, 131 S. Ct. at 2574.

89. *Id.*

90. *Id.* at 2574–75 (citing Abbreviated New Drug Application Regulations, 57 Fed. Reg. 17,950,17,961 (April 28, 1992) (to be codified at 21 C.F.R. pt. 314) ("[T]he [generic drug's] labeling must be the same as the listed drug product's labeling because the listed drug product is the basis for [generic drug] approval.").

91. *PLIVA*, 131 S. Ct. at 2575 ("The FDA argues that CBE changes unilaterally made to strengthen a generic drug's warning label would violate the statutes and regulations requiring a generic drug's label to match its brand-name counterpart's.").

92. *Id.* The FDA and the court similarly foreclosed the availability of "dear doctor" letters to generic manufacturers, which were another way that generic manufacturers could have potentially updated their warnings. *Id.* at 2576.

93. *Id.* (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)). *Auer* deference is a strong form of deference that requires the court to follow an agency's interpretations of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer,* 519 U.S. at 461 (internal quotations omitted).

emption.[94] The court instead found that claims against manufacturers of generic drugs were preempted because it was impossible for the manufacturer to comply with both federal regulation requiring sameness and state law requiring a label change.[95] The court found that if the manufacturers had changed their labels to comply with state law, they would have been in violation of federal law, and therefore state law must yield.[96]

IV.
THE RAMIFICATIONS OF *PLIVA V. MENSING*

Although *PLIVA* may encourage plaintiffs to argue that the reasoning in *Foster* should be reexamined and courts should adopt the *Conte* position, any change in the pervasive law is unlikely. Change is unlikely because *PLIVA* only affects the duties of generic manufacturers and has left the bounds and requirements of state products liability law unchanged.[97] The few courts addressing any potential change in brand-name liability following *PLIVA* have affirmed their reasons for standing by *Foster*.

A. PLIVA *Leaves the Underlying Justifications of* Foster *and Its Progeny Intact*

Although the presumption of the *Foster* decision that claims against generic manufacturers were available has now been rejected by the Supreme Court in *PLIVA*,[98] the decision in *Foster* would not have been different if the court had foreclosed liability to generic drug manufacturers. The discussion of generic liability was not of any significant importance to *Foster's* final holding; generic liability was discussed only after the court laid out its rejection of brand name liability. And the *Foster* court only addressed the issue of generic liability as a rebuttal to the plaintiffs' plea that they would be unable to recover if claims were disallowed against name-brand manufacturers.[99] The *Foster* court was concerned that, given the significant advantages already provided to generic drug manufacturers, the further advantage provided by allowing recovery from brand-name manufacturers by consumers of generic drugs was not

94. *PLIVA*, 131 S. Ct. at 2577–78.
95. *Id.*
96. *Id.* at 2578.
97. *See supra* Part III.
98. *See supra* Part III.
99. Foster v. Am. Home Products Corp., 29 F.3d 165, 169 (4th Cir. 1994).

warranted[100] and was potentially inequitable.[101] *PLIVA*'s denial of liability for a generic manufacturer's failure to warn exacerbates this market advantage; courts considering *Foster* would be unlikely to extend liability to name-brand manufacturers and worsen their market position.

Courts adopting *Foster* have held that products liability law subsumes misrepresentation claims against manufacturers of injury-causing products;[102] because products liability law requires that the defendant manufactured the product at issue,[103] misrepresentation claims against brand-name manufacturers by consumers of generic prescription drugs cannot succeed. Courts have also been hesitant to expand their products liability law because of their belief that the resolution of such an issue is the responsibility of the legislature.[104]

100. *Id.* at 170 ("There is no legal precedent for using a name brand manufacturer's statements about its own product as a basis for liability for injuries caused by other manufacturers' products, over whose production the name brand manufacturer had no control. This would be especially unfair when, as here, the generic manufacturer reaps the benefits of the name brand manufacturer's statements by copying its labels and riding on the coattails of its advertising.").

101. *Id.* ("[Finding preemption] would be especially unfair when, as here, the generic manufacturer reaps the benefits of the name brand manufacturer's statements by copying its labels and riding on the coattails of its advertising.").

102. *See*, *e.g.*, Swicegood v. Pliva, Inc., 543 F. Supp. 2d 1351, 1357 (N.D. Ga. 2008) ("I am not prepared to recognize the viability of misrepresentation claims distinct from products liability or failure to warn claims. In my view, misrepresentation claims against a manufacturer properly collapse into the failure to warn claims."); Colacicco v. Apotex, Inc., 432 F. Supp. 2d 514, 539 (E.D. Pa. 2006), *aff'd on other grounds*, 521 F.3d 253 (3d Cir. 2008), *vacated on other grounds*, 129 S. Ct. 1578 (2009) ("[U]nder Pennsylvania law, the most essential characteristic of any product liability action . . . is that the defendant manufactured or sold the product in question.") (internal quotation marks omitted).

103. Wilson v. Wyeth, Inc., No. 3:07-CV-378-R, 2008 WL 2677049, at *1 (W.D. Ky. June 30, 2008) ("Whatever products liability theory a plaintiff pursues, there are certain requirements that are found in all products liability cases. One such requirement is a defendant's product must have caused Plaintiff's injury to be liable under Kentucky products liability law.").

104. Mensing v. Wyeth, Inc., Civil No. 07–3919 (DWF/SRN), 2008 WL 4724286, at *5 (D. Minn. Oct. 27, 2008) ("The Court is sympathetic to the fact that Plaintiff may lack a legal remedy due to the fact that she did not ingest name-brand Reglan and that her claims against the generic manufacturers are preempted by federal law. However, such sympathy does not warrant a departure from clear Minnesota law. That Plaintiff is left without a remedy is an issue for the legislature, not this Court."), *aff'd*, 588 F.3d 603 (8th Cir. 2009), *rev'd sub nom.*, PLIVA v. Mensing, 131 S. Ct. 2567 (2011); *see also* Metz v. Wyeth, No. 8:10-CV-2658-T-27AEP, 2011 WL 5826005, at *2 (M.D. Fla. Nov. 18, 2011) ("Even assuming, without deciding, that sound policy reasons exist for broadening the scope of brand name pharmaceutical manufacturers' liability in light of *Mensing*, that is a matter best addressed by the Florida Legislature or the Supreme Court of Florida.")

PLIVA leaves state products liability doctrine unaltered, so therefore *PLIVA* has not created a reason to remove misrepresentation claims from the purview and requirements of this law.

B. PLIVA*'s Strengthening of* Conte*'s Reasoning*

The best argument for a change in the legal landscape is that the holding of *PLIVA* has strengthened *Conte*'s reasoning. Although the *Conte* court did not address the issue of preemption of claims against generic manufacturers, the court would have likely sided with the *PLIVA* majority. To this extent, it has been argued that the potential preemption of claims against generic drug manufacturers influenced the court's decision, since: "Judges, being human beings, don't like putting large numbers of plaintiffs entirely out of court."[105] By preempting claims, *PLIVA* has now expressly left consumers of generic drugs without a judicial remedy for their injuries. This suggests that although the *Conte* court did not expressly adopt the position taken in *PLIVA*, *PLIVA*'s holding may in fact reinforce the position.

C. Recent Decisions After PLIVA

Despite *PLIVA's* reinforcement of *Conte*'s logic, recent decisions have shown no change of heart and have stood with *Foster* in denying claims against name-brand manufacturers.[106] In *Gross v. Pfizer, Inc.*, the plaintiffs requested reconsideration of the District Court of Maryland's grant of summary judgment in favor of a name-brand manufacturer in light of the Supreme Court's decision in *PLIVA*. The district court refused the plaintiffs' request, and held that the Supreme Court's decision in *PLIVA* gave the court no rea-

105. Beck & Herrmann, *Generic Drug–Pioneer Liability*, *supra* note 39 (arguing that Conte's true reason for allowing claims against Wyeth was based on pressure put on the product identification requirement by preemption of claims against manufacturer's of generic drugs); *see also* Bridget M. Ahmann & Jennifer Y. Dukart, *Could Preemption Rulings for Generic Manufacturers Be Bitter Pill for Name-Brand Manufacturers?*, FAEGRE, BAKER AND DANIELS, UPDATES & EVENTS (Nov. 13, 2008), http://www.faegrebd.com/8662 ("An aversion to the lack of remedy facing plaintiffs may explain the California Court of Appeal's decision in Conte v. Wyeth.").

106. *See, e.g.*, *In re* Darvocet, Darvon and Propoxyphene Prods. Liab. Litig., No. 2:11-MD-2226-DCR, 2012 WL 3984871, at *2 (E.D. Ky. 2012); Baymiller v. Ranbaxy Pharm., Inc., No. 3:11-CV-858-RCJ-VPC, 2012 WL 3929768, at *9 (D. Nev. 2012); Phares v. Actavis-Elizabeth LLC, No. CIV. B:11-63, 2012 WL 3779227, at *10 (S.D. Tex. 2012); *Metz*, 2011 WL 5826005, at *2-3; Morris v. Wyeth, Inc., Civil Action No. 3:09-CV-854, 2011 WL 4975317, at *2 (W.D. La. Oct. 19, 2011); Gross v. Pfizer, Inc., No. 10-CV-00110-AW, 2011 WL 4005266, at *2 (D. Md. 2011).

son to rethink its initial grant of summary judgment in favor of a name-brand manufacturer.[107] *Gross* denied that *PLIVA* had any effect on the duties of name-brand manufacturers.[108]

Similarly, in *Metz v. Wyeth*, the District Court of Minnesota rejected the plaintiff's contention that *PLIVA* overturned *Foster*'s holding.[109] *Metz* held that *Foster*'s primary justification was "based on. . . . the general rule that one manufacturer cannot be held liable on a negligent misrepresentation theory for injuries caused by another manufacturer."[110] The court did not find any conclusions in *Foster* that had been rejected by *PLIVA*.[111]

Gross and *Metz* provide the best evidence of how courts will likely address brand-name liability following *PLIVA*. Before *PLIVA*, courts following *Foster* had shown hostility towards expanding the duties of name-brand manufacturers.[112] Although *Foster* was decided in part based on assumptions expressly rejected by *PLIVA*,[113] *Foster* was driven by an understanding of the duties of name-brand manufacturers and the definitions and requirements of products liability claims.[114] These are the aspects of *Foster* that have been so heavily adopted and relied upon by other courts.[115] *Gross* and *Metz*

107. Gross v. Pfizer, Inc., 10-CV-00110-A W, 2011 WL 4005266, at *2 (D. Md. Sept. 7, 2011) (denying plaintiff's motion for reconsideration).

108. *Id.* ("The Supreme Court's holding in [*PLIVA v.*] *Mensing* neither created nor abrogated any duty under Maryland law with regard to brand-name manufacturers . . . .").

109. *Metz*, 2011 WL 5826005, at *2 ("The thrust of Plaintiffs' argument is that the Fourth Circuit's holding in the seminal case of Foster v. American Home Products Corp., 29 F.3d 165 (4th Cir.1994), was based on the proposition (discussed in dicta) that consumers could recover from generic manufacturers for misrepresentations relating to their products. *Id.* at 170. While it is true that this proposition was rejected by the Supreme Court in *Mensing*, this proposition was by no means central to the ultimate holding in *Foster*.").

110. *Metz*, 2011 WL 5826005, at *2.

111. *Id.*

112. *See, e.g.*, Mosley v. Wyeth, Inc., 719 F. Supp. 2d 1340, 1348 (S.D. Ala. 2010) ("The fact that federal law allowed generic manufacturers to streamline the approval process by relying on the initial warning labels provided by Wyeth and/or Schwarz, does not create a duty between Wyeth/Schwarz and a generic consumer."); Craig v. Pfizer, Inc., No. 3:10-00227, 2010 WL 2649545, at *3 (W.D. La. May 26, 2010), *adopted by*, 2010 WL 2649544 (W.D. La. June 29, 2010) ("Louisiana state cases and cases interpreting Louisiana law clearly indicate that a brand name manufacturer of a drug does not owe a duty to a consumer of the generic formulation of the drug.").

113. *See supra* Part II.A.

114. *See supra* Part II.A.

115. *See, e.g.*, Meade v. Parsley, No. 2:09-cv-00388, 2009 WL 3806716, at *3 (S.D. W.Va. Nov. 13, 2009) (applying *Foster*'s conclusions about Maryland's products liability law to analogous laws in West Virginia); Burke v. Wyeth, Inc., No. G-

affirm the continued relevance of these aspects of *Foster* and will prove influential for other courts.

D. Sources of Solutions

Since courts are unlikely to independently create a remedy, changes in the law must now come from other sources if consumers of generic drugs are going to receive compensation for the harms they suffer. State legislatures could change the law and allow claims by generic consumers to be brought against name-brand manufacturers by expressly expanding the duties of name-brand manufacturers to cover consumers of generic drugs. One complication, however, is that a state-created cause of action could be preempted by federal law. Change could also come at the federal level. Federal compensation funds could be established for injured consumers of generic drugs, similar to what has been done in the vaccine context.[116] Any attempt at reform will need to resolve the conflict between the desire to keep the price of generics low and the desire to compensate victims. Striking that balance is a decision that the courts will leave to the legislatures.[117]

CONCLUSION

A doctrinal change following *PLIVA* is unlikely because at the heart of the holding in *Foster* is a broad conception of the bounds of products liability law and a denial of a name-brand manufacturer's duty to consumers of generic drugs. Although *PLIVA* has made it more difficult for consumers of generic drugs to recover if injured due to inadequate warnings, its holding did nothing to change the bounds of products liability or expand the duties of name-brand

09-82, 2009 WL 3698480, at *3 (S.D. Tex. Oct. 29, 2009) (adopting the view of *Foster* that imposing a duty upon name-brand manufacturers is to stretch foreseeability too far).

116. For discussion of an example of a compensation fund, see discussion of the vaccine compensation system in Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1073–74 (2011). *See also* National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 to 300aa-34 (2006).

117. Mensing v. Wyeth, Inc., Civ. No. 07-3919 (DWF/SRN), 2008 WL 4724286, at *5 (D. Minn. Oct. 30, 2008) ("The Court is sympathetic to the fact that Plaintiff may lack a legal remedy due to the fact that she did not ingest name-brand Reglan and that her claims against the generic manufacturers are preempted by federal law. However, such sympathy does not warrant a departure from clear Minnesota law. That Plaintiff is left without a remedy is an issue for the legislature, not this Court."), *aff'd*, 588 F.3d 603 (8th Cir. 2009), *rev'd sub nom.*, PLIVA v. Mensing, 131 S. Ct. 2567 (2011).

manufacturers. Therefore, the basic and essential understandings relied upon by the *Foster* court have been left unchanged and will continue to be relied upon in future decisions.